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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-6715

ALVIN CULBERSON, Petitioner,

v.

STATE OF MISSISSIPPI, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

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IN THE
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OCTOBER TERM 1979

No. 79-

ALVIN CULBERSON, Petitioner,

v.

STATE OF MISSISSIPPI, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi, which affirmed on November 28, 1979, his conviction and sentence of death (rehearing denied February 20, 1980); Culberson v. State, No. 50,802.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 379 So.2d 499 (1979) (Appendix A). On the first appeal taken in this case, in an opinion reported at 348 So.2d 1025 (1977), the Mississippi Supreme Court reversed the conviction and sentence of death and remanded for a bifurcated trial in accordance with Jackson v. State, 337 So.2d 1242 (1976).

JURISDICTION

This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. § 1257(3), since petitioner has asserted below and is asserting here deprivation of rights secured by the Constitution of the United States. On May 23, 1980, this Court, per Mr. Justice Powell, granted petitioner's emergency application for an extension of time to June 4, 1980 within which to file this peti-

tion for a writ of certiorari. (Appendix B).

QUESTIONS PRESENTED

1. Whether petitioner's right to due process was violated when the evidence on which he was convicted and sentenced to die consisted solely of the uncorroborated testimony of an accomplice who received a widely disparate sentence and whose testimony was shown to be unreliable.

2. Whether the imposition of the sentence of death upon petitioner absent a finding that he intended to bring about the death of another person, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. Whether the jury at petitioner's capital murder trial was accorded virtually unguided and unrestrained discretion to sentence him to death, in violation of the Eighth and Fourteenth Amendments, as a result of Mississippi's broad and vague construction of certain aggravating circumstances under Mississippi Code § 99-19-101.

4. Whether petitioner's Sixth Amendment rights to effective assistance of counsel, compulsory process and trial by jury were denied when the trial court overruled his request for a continuance to obtain critically necessary witnesses to present his defense to the charge of capital murder.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Mississippi Code: Section 97-3-19, Section 99-19-101; and Section 99-19-105. These statutes are set forth as Appendix C to this petition.

STATEMENT OF THE CASE

Petitioner and Alvereece Pittman, black males, 22 and 19, were accused of the murder of Grady V. Evans, a white male, during the commission of a robbery.[1] Culberson v. State, 379 So. 2d at 503.

I. Testimony of Accomplice Pittman:

At both trials, the evidence used to convict petitioner and sentence him to die consisted solely of the uncorroborated testimony of the accomplice, Pittman. Petitioner did not testify at either the guilt or sentence phase. According to Pittman, on the morning of January 31, 1975 he and petitioner met in a restaurant and mutually agreed to rob someone. 379 So.2d at 502.

Pittman's account in his testimony on direct (R.170-175):

> Well, we was sitting there and Alvin came, and we just started about robbing somebody. He was broke and I was broke. We wasn't looking for nobody in particular to rob, we was just walking up towards Old Highway 49, and on our way up toward old Highway 49 we saw a Frito truck in front of the Beverly Lounge. We was walking that way, and alongside the ditch was a table leg, a stick, and Alvin picked the stick up and we went on up to the Club.
>
> * * *
>
> Q. Now, after Alvin picked up the stick, what did you do then?
>
> A. We started on walking toward the Lounge where the Frito truck was parked.
>
> * * *
>
> Q. Now, seeing that truck parked up there, Mr. Pittman, what did you do? After you had located that truck parked up there at the Beverly Lounge, what did you and the Defendant do?
>
> A. We went walking toward the truck with the stick.
>
> Q. What were you going to do?
>
> A. Going to knock the man out with the stick.
>
> Q. And do what?
>
> A. Rob him. After we knocked him out we was going to get his money.
>
> Q. Whose idea was it to commit this robbery?
>
> A. Alvin's. It was both, I agreed with him.

---

1 There being no proof of robbery, the jury was instructed on attempted robbery. The verdict was "guilty as charged," but the original indictment was never amended.

Q. Who was the one that mentioned it?

A. Alvin.

Q. And you agreed with him?

A. Yes, sir.

Q. And as you walked on up to him, tell the Court and jury exactly what happened?

A. We walked up to the Beverly Lounge and by that time we cut around, the way the truck was parked in we cut around the corner, like we was going to the Club, and by that time Grady Evans was walking out of the Club. I guess he was going to get his order.

* * *

A. We spoke and by the time we got past him -

Q. Did the man speak back?

A. Yes, sir.

Q. Was it any kind of arrogant speaking?

A. It was just a normal hello, how're you doing. And Alvin turned around and hit the man in the back of the neck with the stick, which he intended to knock him out. He knocked him down but he didn't knock him out, and the man fell on the ground and begged him, throwed up his hands and hollered for help.[2]

Q. What did the man say when he fell on the ground?

A. He hollered for help.

Q. What did the man say? Just tell the jury what he said.

A. He said "help, help me", and by that time Culberson pulled out the gun and shot him, and I said "what you done done, man? Let's go", and we took off running and run toward the Tims Motel and I slipped down going in the door, and I got back up and ran, and we got away.

II. Attack on Credibility of Accomplice:

Evidence introduced by the State and by petitioner contradicted Pittman's account. Two witnesses saw either one or two persons fleeing the scene of the crime. However, neither of these witnesses could identify Culberson as one of these persons, although one of the witnesses, Dorothy (Durr) Coleman, testified that the two men passed within eight to ten feet of where she stood and she spoke to them (R.66, 67). The second witness, Tims, testified that he saw only one man running and that, while he knew Culberson by sight, he could not identify him as the man he saw (R.166).

---

2 Although the stick was introduced into evidence by the State, there were no fingerprints, and no explanation of their absence.

Another witness, Holmes (Green), manager of the restaurant where Pittman claimed to have met with petitioner, did not recall seeing either man in the restaurant on the day in question (R.224). Yet, Pittman claimed to have spent almost two hours there (R.181), and to have spoken to this witness while he was there (R.183). In addition, petitioner's mother testified out of the presence of the jury, on the motion for new trial, that she had seen petitioner in an automobile with two other persons at approximately the time Pittman testified that the robbery took place (R.345).

Pittman's credibility was also drawn into question by a prior inconsistent statement under oath, constituting a retraction of his testimony that petitioner shot the victim (R.200). In this statement, signed on March 19, 1976 Pittman swore that he had not seen petitioner "kill, shoot or rob anyone." This statement also recounted that the prior testimony (given at the first trial) was the result of coercion and a promise of leniency (Id.). In an attempt to explain this statement, Pittman testified that he had made it because of his fear of petitioner, who was then incarcerated in a maximum security facility, in an area removed from where Pittman was detained (R.195).

On still another occasion, right after the crime, Pittman had stated that he himself had committed the murder. The person to whom he made this statement, Cora Thompson, his former girlfriend (R.193), gave the following testimony on the motion for new trial (R.350-351):

> BY MR. JOHNSTON: (Continuing)
>
> Q. What did he ask you, if you remember, about did you notice anything about a killing?
>
> A. Well, he didn't ask me. He showed me that Club, the Blue Light Club, and he said "you heard about the man that got killed in North Gulfport?" And I said "yes", and he said "Do you know who killed him?" And I said "No", and he pointed to himself.
>
> Q. I ask you, Cora, if you know whether or not Alverese had a pistol?
>
> A. Yes.
>
> Q. Did he show it to you?

A. Yes, I have seen the pistol he had before.

Q. Had you seen the pistol before the shooting?

A. Yes, I saw it before the killing.

Q. And afterwards too?

A. No, I didn't see it afterwards.

Q. Do you remember what kind of pistol it was?

A. Yes.

Q. How was it identified in your mind?

A. It was a .22 with black tape around the handle of it.

Q. I show you a pistol that has been offered in evidence in this case, and ask you if you have seen that before?

A. Yes, that's the gun.

Q. That's the gun that Alverese showed you?

A. Yes.[3]

During cross-examination, Pittman was asked if he had ever made such an admission to Cora Thompson; he denied having done so (R.194). Cross-examination also revealed that Pittman's charge had been reduced from capital murder to manslaughter, and that he had served only two and one-half years (R.197).

III. Request for Continuance To Obtain Necessary Witnesses:

Petitioner's trial attorney moved for a continuance in order to obtain crucial witnesses necessary for the presentation of the defense. This motion was renewed several times and overruled each time (R.14, 69, 72, 73, 128, 220 and 222). Two witnesses were described as being able to testify as to ownership of the gun and were said to have been near the scene of the crime shortly after it occurred. Trial counsel advised the Court that "these people must be had by the defense if it is to have a defense." In overruling the motions for continuance the court requested the sheriff to continue his efforts to find the witnesses. Several of the missing witnesses did finally testify on the motion for new trial. One witness was never found by the sheriff.

The Court below felt that the trial court did not abuse

3 Although the gun was introduced into evidence, no ballistic tests were conducted by the state, and there was no ballistic evidence to connect the gun with the bullet removed from the victim.

its discretion in denying the requests for continuance since trial counsel did not comply with the requirements of the continuance statute and support his request with affidavit as to what the witnesses would say. 379 So.2d at 505. The Court also concluded that the missing witnesses would add little of consequence to petitioner's defense. (Id.).

IV. Instructions and Argument to Jury:

The jury was instructed that it could find petitioner guilty of capital murder if it found that the murder was committed during the course of a robbery, whether or not petitioner intended to kill the victim (R.232). During the sentence phase, the jury was instructed that it might consider as aggravating circumstances the petitioner's prior convictions, the fact that the murder was committed during the commission or attempted commission of a felony, and that the offense was "especially heinous, atrocious or cruel." (R.283). These last quoted terms were not defined for the jury; and neither was the jury instructed to avoid the influence of passion, prejudice or any other arbitrary factor (R.287-289).

In his argument to the jury the district attorney suggested petitioner was not entitled to a fair trial since he did not give Grady Evans a fair trial; he also alluded to the victim's military record and to his widow and children, and to the fact that a white man had been killed by a black man. (R.297-299). Although objections to these remarks were sustained, there is no reference to them in the opinion below, or to the absence of an instruction on passion, prejudice or other arbitrary factor; nor does the record contain the complete voir dire or arguments of counsel.

The jury found that all three aggravating circumstances were present and that, since the mitigating circumstances did not outweigh the aggravating circumstances, petitioner should suffer the penalty of death (R.307).

V. Death Penalty Affirmed by Divided Court:

Petitioner's conviction was affirmed unanimously, but his death sentence divided the court 6 to 3. The three dissenting justices felt that the sentence of petitioner's co-indictee was too disproportionate "considering both the crime and the defendant;" and also considering "the dubious quality of Pittman's testimony (when) compounded by his admission of perjury in making a false affidavit concerning the homicide." 379 So.2d at 513-514.

HOW FEDERAL QUESTIONS WERE RAISED BELOW

On appeal petitioner contended his conviction was not supported by the evidence, since it consisted solely of the uncorroborated testimony of the accomplice. The Mississippi Supreme Court rejected this contention based on state practice of allowing convictions to rest on the uncorroborated testimony of an accomplice. 379 So.2d at 503. While the Court recognized that "none (of the witnesses) could identify Culberson as one of the men they observed" (Id. at 502-503), and that Pittman's testimony and credibility were flawed, the Court found that Pittman had sufficiently explained his prior inconsistent statement and that

> Pittman's testimony is neither unreasonable nor uncorroborated. The photographs, the physical facts, corroborated Pittman in every important particular. (Id. at 503).

The Court found that, while Cora Thompson's testimony "could have possibly affected (Pittman's) credibility," and that Robinson's testimony "raised an ambiguity about the ownership of the gun," it was not error to deny the repeated motions for continuance to obtain critically necessary witnesses. 379 So.2d at 505. The Mississippi Supreme Court further held that the "great disparity between the sentences of Pittman and Culberson" was merely the result of prosecutorial discretion and the accomplice's testimony was sufficient to support a sentence of death. 379 So.2d at 510.[4]

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4 The Mississippi Court reached this conclusion despite its recog-

Petitioner attacked the constitutionality of the felony-murder statute on the ground that it permitted the imposition of a death sentence on one who had not manifested an intent to kill. The Mississippi Supreme Court, holding that the "subjunctive nature of the intent to kill makes it no less . . . deserving of capital punishment than if it had been expressed," found that none of this Court's decisions required holding the statute unconstitutional on that basis. 379 So.2d at 507.

Finally, the Mississippi Supreme Court found that the "sentencing phase progressed without procedural error," and that the evidence supported the jury's findings of the statutory aggravating circumstances. 379 So.2d at 508-509.

REASONS FOR GRANTING THE WRIT

I. The Imposition of a Sentence of Death Based Solely on the Uncorroborated Testimony of An Accomplice Who Received a Widely Disparate Sentence and Whose Testimony is Shown to be Unreliable Constitutes a Violation of Due Process.

In Woodson v. North Carolina, 428 U.S. 280, 305 (1976) this Court recognized that the qualitative difference between the death penalty and any other punishment led to a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment." This Court later reaffirmed the notion that there is a "significant constitutional difference between the death penalty and lesser punishments for crime." Gardner v. Florida, 430 U.S. 439 (1977).

The Mississippi Supreme Court based its affirmance, in part, on the long standing rule in the state that a conviction may rest on the uncorroborated testimony of an accomplice. 379 So.2d at 505. The Court further noted that the use of this testimony to sentence petitioner to death was necessary to sustain both the penalty and the conviction. 379 So.2d at 510. In this case of first

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nition this was the first case in Mississippi where the death penalty rests "solely upon the testimony of an admitted accomplice who . . . received a sentence of manslaughter when by his own admission he was an accomplice to capital murder." (Footnote continued from page 2).

impression the Court expressly refused to hold that while a capital conviction may rest upon the testimony of an accomplice, such evidence would be insufficient to sustain a sentence of death. Petitioner submits that recent decisions of this Court mandate a reversal of his death sentence because it rested on evidence which failed to satisfy the "need for reliability."

The crucial nature of Pittman's testimony is explicitly recognized by the Court below: "Without the testimony of Pittman, there was no evidence to place Culberson at the scene of the crime AND TO SHOW THAT HE FIRED THE FATAL SHOT. (Emphasis added). 379 So. 2d at 510. The State's other evidence merely showed that a crime had been committed and some of the circumstances thereof, but it is clear that there was no independent evidence even tending to connect petitioner with the crime.[5] From Pittman's testimony it is equally likely that he was the one who fired the fatal shot, and indeed, one witness testified that he had boasted at having done so.[6]

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5 Of the states authorizing capital punishment, several require that the accomplice's testimony must be corroborated by evidence that tends to connect the defendant with the crime. See, e.g., Alabama Code § 12-21-222; Arkansas Code § 43-2116; California Code Penal § 1111; Georgia Code Ann. § 38-121; Kentucky R. Cr. 9.-62. See also Smith v. Com., S.Ct.Ky. No. 78-SC-698-MR (Apr. 22, 1980) (reversal of death sentence based on trial court's failure to instruct jury on corroboration requirement); Hilliard v. State, 406 A.2d 415 (Md.1979); Nev. Rev.Stat. § 175.291; N.Y. CPL § 60.22.

6 It is self-evident that any accomplice is likely to be fully apprised of the circumstances of the crime inasmuch as he was, by his own admission, present at the scene. In addition, while the motive to lie may not be so readily presumed for accomplices in all cases, where the accomplice might himself have received a death sentence, that motivation is much more likely present:

> The temptation to commit perjury which influences (the accomplice's) credit must be proportioned to the punishment annexed to the crime of which the witness confesses himself guilty.

Chief Baron Joy, 1844, Evidence of Accomplices, 4, quoted in Wigmore on Evidence § 2056, p. 323.

Three justices of the Mississippi Supreme Court, in dissenting from the majority decision to affirm the death sentence, recognized that the evidence on which it was based fell far below acceptable standards of reliability:

> Consideration as dear as life, in my opinion, leaves the testimony for which it was given as questionable as if it had been purchased with cash. The dubious quality of Pittman's testimony is compounded by his admission of perjury in making a false affidavit concerning the homicide. His testimony is too suspect to permit us justly, in my opinion, to ignore the disparity of sending one man to the gas chamber while his confessed accomplice roams free after two and one-half years of confinement. I think the termination of life by the state should rest upon a firmer basis and should not portray the appearance of such gross disproportions.

379 So.2d at 514.

The instant case illustrates that a rule of evidence applicable in a non-capital case may well be inadequate to eliminate the "risk of error inherent in the truth finding process." Carey v. Piphus, 435 U.S. 247, 259 (1978), quoting from Matthews v. Eldridge, 424 U.S. 319 344 (1976). Where the stakes are life or death, there is a greater constitutional necessity for procedures which minimize the risk of error, more so than in a non-capital case where only the defendant's liberty is at issue. See, e.g. Powell v. Alabama, 287 U.S. 45, 71 (1932); Valdez v. United States, 244 U.S. 432, 450 (1917) (Clarke, J., dissenting); Lockett v. Ohio, 438 U.S. 586, 605 & n.13 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) See also, Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); Lockett v. Ohio, supra, 438 U.S. at 604 ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

Only last term, this Court rejected an attempt by the State of Georgia to apply rules of evidence "mechanistically to defeat the ends of justice," Green v. Georgia, 442 U.S. 95, 97 (1978)

(per curiam), quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In the choice between life and death the use of the uncorroborated testimony of an accomplice, whose testimony is unreliable and is shown to have been effective in obtaining a lenient sentence, presents a risk that is "unacceptable and incompatible with the commands of the Eigh and Fourteenth Amendments." Lockett v. Ohio, supra, 438 U.S. at 605.

This Court should grant the writ of certiorari to consider whether petitioner's sentence should not be reversed, based on the unreliable nature of the evidence that condemned him to die.

II. The Imposition of a Sentence of Death Upon Petitioner Absent Proof That He Intended to Bring About the Death of Another Person Violates the Eighth and Fourteenth Amendments.

In Gregg v. Georgia, 428 U.S. 153 (1976), the prevailing opinion identified as a crucial Eighth Amendment inquiry "whether the punishment of death is disproportionate in relation to the crime for which it is proposed." Id., at 187. See also, Coker v. Georgia, 433 U.S. 584 (1979).

The jury which convicted petitioner and sentenced him to die was instructed that it need find only that the murder was committed during the commission or attempted commission of a robbery (R.297-298). The evidence before the jury was that the intent was to render the victim unconscious. (R.175). The evidence also indicated that the victim was shot only after he yelled for help (R.173). There is no evidence that petitioner intended to take the life of the victim.

Inflicting the sentence of death upon anyone without a finding that the defendant acted intentionally to take a human life is a disproportionate and excessive punishment forbidden by the Eighth and Fourteenth Amendments to the Constitution. In Gregg v. Georgia, supra, the prevailing opinion concluded that where the crime is "murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably dis-

proportionate to the crime." 428 U.S. at 187 (emphasis added).

Punishing petitioner for the death of the victim by sentencing him to death, without a showing that he intended or deliberated on the death of the victim, is unconstitutionally disproportionate because it "makes no reasonable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Coker v. Georgia, supra, 433 U.S. at 592.

Petitioner urges the conclusion reached by Mr. Justice White (and not disputed by the opinion of the Chief Justice) in his concurring opinion in Lockett v. Ohio, 438 U.S. 586, 624 (1978): "(I)t violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." See also id., at 614 (Blackmun, J., concurring: "I would hold that death may not be inflicted for killings consistent with the Eighth Amendment without finding that the defendant engaged in conduct with the conscious purpose of producing death").

Where, as here, a capital murder conviction and death sentence are based exclusively upon a felony-murder theory with no finding of intent to kill, such a capital sentence rests upon a degree of personal culpability which is indistinguishable from Coker's. Nothing more than petitioner's involvement in the underlying felony was necessary to make him guilty of murder (capital); he [illegible] have fired the gun, as § 97-3-19(2) makes plain, "with or without any design to effect death" or even to discharge the weapon. Thus, a death in fact resulted from the felony here, unlike Coker; but it is now settled that the infliction of capital punishment based upon the nature of the offense alone ignores considerations which are "a constitutionally indispensable part of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(plurality opinion); see also Lockett v. Ohio, supra; (Harry) Roberts v.

Louisiana, 431 U.S. 633, 636-637 (1977)(percuriam); (Stanislaus) Roberts v. Louisiana, 428 U.S. 325, 332-334 (1976)(plurality opinion).

The unmistakable teaching of these cases is that capital sentencing must depend upon the offender's individual culpability, not merely the category of crime that is produced by the consequences of his acts. It follows that if the offender's culpability is not appreciably greater than Coker's, the infliction of a death sentence upon him would be both disproportionate and violative of the Eighth Amendment's command that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice." Gardner v. Florida, supra, 430 U.S. at 358.[7]

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7 Indeed, the disproportionality problem under Mississippi law is even worse than that identified by Justice White in Lockett. This is so because the prosecution's proof of an unintentional robbery-murder not only satisfies the requirements for a capital murder conviction under Mississippi law, but also automatically establishes an aggravating circumstance. Since only a single aggravating circumstance need be found to support a death sentence, persons like petitioner who are convicted of nondeliberate robbery-murder enter the sentence phase with the prerequisites for the penalty of death already established, whereas, in cases "where the killing is deliberate, it is not punishable by death absent proof of (additional) aggravating circumstances." Coker v. Georgia, supra, 433 U.S at 600.

The North Carolina Supreme Court has noted and cured this anomaly --partly as a matter of statutory construction designed to avoid disproportionality in capital sentencing, partly in response to double jeopardy concerns (see also Bufford v. Alabama, ___ So.2d ____, Ala. Ct.Crim.App. 1980: "Robbery (murder) cannot be aggravated by robbery or else the appellant is punished twice for the same act")--under virtually identical crime and punishment provisions as those involved in the present case:

> "The possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the 'automatic' aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony." State v. Cherry, 257 S.E.2d 551, 568 (N.C.1979).

Under Mississippi law, however, petitioner's commission of an unintentional killing during a robbery would both expose him to the death penalty for capital murder and establish the only necessary aggravating circumstance for death-sentencing purposes, thus leaving him subject to a "disproportionately higher (exposure to the death penalty) than . . . a defendant convicted of a premeditated killing."

III. The Jury at Petitioner's Capital Murder Trial Was Accorded Virtually Unguided and Unrestrained Discretion to Sentence Him to Death, in Violation of the Eighth and Fourteenth Amendments, as a Result of Mississippi's Broad and Vague Construction of Certain Aggravating Circumstances Under Mississippi Code § 99-19-101.

A. Unbridled Discretion of Mississippi Juries:

In Furman v. Georgia, 408 U.S. 238 (1972), this Court mandated that the death penalty cannot be imposed under sentencing procedures which create a substantial risk that the ultimate sanction will be inflicted in an arbitrary and capricious manner. The constitutional flaw in the pre-Furman statutes was that the sentencing jury was accorded unguided and unrestrained discretion to determine whether death was the appropriate punishment in a particular case. The capital sentencing procedures upheld in Gregg v. Georgia, 428 U.S. 153 (1976), seemed to eliminate this defect, since the Georgia statute required the jury to find a statutory aggravating circumstance before it could recommend a sentence of death, and since the Supreme Court of Georgia had "demonstrated a concern that the new sentencing procedures provide guidance to juries." Gregg v. Georgia, supra, at 202.

While Mississippi has adopted a statute containing the procedures which passed constitutional muster in Gregg, the Supreme Court of Mississippi has permitted such an open-ended construction of the statutory aggravating factors that any meaningful guidance for juries is virtually eliminated. The dangers of arbitrariness and caprice condemned in Furman have not been significantly reduced in Mississippi. Rather, as the present case vividly illustrates, there still remains a substantial risk that the death penalty will be arbitrarily inflicted by Mississippi juries.

The constitutional shortcomings in the Mississippi procedure are evident when it is compared with the capital sentencing procedures scrutinized by this Court in Gregg, and also in Profitt v. Florida, 428 U.S. 242, at 254-256. In these decisions the plurality rejected the petitioners' claims that the new capital sentencing

procedures in Georgia and Florida had failed to eliminate the unbridled discretion to impose the death penalty, which Furman had condemned. Gregg v. Georgia, 428 U.S. at 200-203; Proffitt v. Florida, 428 U.S. at 254-256. The plurality concluded that no such danger existed in those states because their supreme courts, in construing the statutory aggravating circumstances, had "demonstrated a concern that the new sentencing procedures provide guidance to the juries." Gregg, supra, at 202.

B. Overbredth and Vagueness of Heinous, Atrocious or Cruel:

Here petitioner's death sentence rests in part on the trial court's instruction based on the aggravating circumstances provision of Miss. Code Ann. § 99-19-101, that petitioner's crime was "especially heinous, atrocious or cruel." (R.288).

This provision of the Mississippi capital murder statute is so broad and vague on its face that it raises a serious question whether petitioner was given reasonable notice as to the circumstances under which he might receive the death penalty. In this case, involving a killing during an alleged attempt to rob the victim, an "especially heinous" finding was made, without the trial judge defining the terms for the benefit of the jury, but merely invoking the provision in a perfunctory manner.

Such disparity graphically demonstrates how this provision has been applied so inconsistently that Mississippi's system for adjudicating capital cases has the same potential for capricious and discriminatory application condemned by this Court in Furman. See also, Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (due process violated by vague statute because "there are no standards governing the exercise of the discretion granted by the ordinance" and "the scheme permits and encourages an arbitrary and discriminatory enforcement of the law").

Nor has the Supreme Court of Mississippi provided any real guidance as to the meaning of this provision. In fact, unlike the appellate review of death sentences approved in Gregg, the Supreme

Court of Mississippi has made no serious effort to ensure that the factual situation and aggravating circumstances in this case were similar to others where the death penalty was imposed. The opinion below lists the cases which it compared with the instant case (see page 509 of the opinion). The facts in these cases, briefly, are as follows:

Bell: 1) Armed robbery and kidnap with execution style murder;

Gray: 2) Kidnap and murder of 3 year old girl;

Irving: 3) Shotgun killing at close range of proprietor of store during attempted robbery;

Jordan: 4) Kidnap and murder of wife of bank officer, then obtaining ransom from victim's husband;

Voyles: 5) Victim beaten and robbed, then killed by driving car over unconscious body;

Washington: 6) Victim shot in stomach at close range as defendant was leaving convenience store after robbery.

Petitioner submits that the facts in none of these cases compare with the facts in the instant case so as to warrant imposition of the sentence of death.

Other state supreme courts have evidenced a concern for articulating guidelines for the application of the aggravating circumstances contained in their capital sentencing statutes. See, e.g. State v. Goodman, 257 S.E.2d 569, 583-587 (N.C.1979); State v. Rust, 197 Neb. 528, 250 N.W.2d 867, 873-875 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 891-892 (1977); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849, 863-865 (1977). The purpose of such interpretations is to ensure that "instructions on (the) aggravating circumstances will only be given the jury in appropriate cases." State v. Goodman, supra, 257 S.E.2d at 586.

Unfortunately the Supreme Court of Mississippi has chosen not to follow the lead of these courts. Instead, it has rejected any efforts to limit the possible interpretations of the statutory

aggravating circumstances. Washington v. State, 361 So.2d 61, 65 (Miss.1978)(court concludes that the "especially heinous, atrocious or cruel" circumstance is not vague or open-ended). The Mississippi court has upheld with little or no discussion the aggravating circumstances found by the jury in every death penalty decision to date. Reddix v. State, No. 50,999, decided February 20, 1980; Jones v. State, No. 50,944, decided January 30, 1980; Culberson v. State, 379 So.2d 499 (1979); Jordan v. State, 365 So.2d 1198 (1978); Voyles v. State, 362 So.2d 1236 (1978)(reversed on habeas corpus in No. GC 79-115-K-P, U.S.D.C., N.D.Miss., May 13, 1980, inadequate representation of counsel); Irving v. State, 361 So.2d 1360 (1978); Washington v. State, 361 So.2d 61 (1978); and Bell v. State, 360 So.2d 1206 (1978).

This record does not reflect "a concern that the new sentencing procedures provide guidance to juries." Gregg v. Georgia, supra, 428 U.S. at 202. Rather, it suggests that juries in Mississippi have complete license to return whatever aggravating circumstances they wish with little, if any, risk of their findings being disturbed on appeal.

The present case provides a vivid illustration of this disturbing development. The jury found: (1) that the capital murder was committed while the defendant was engaged in the commission of the crime of attempted robbery; (2) that the capital offense was especially heinous, atrocious or cruel; and (3) that the defendant had been previously convicted of a felony involving the use or threat of violence to the person. These circumstances were all upheld on appeal, without any suggestion that they are susceptible of widely differing interpretations or that they might have been construed in an overly broad manner by the sentencing jury. There are substantial constitutional defects, however, in the application of each of these aggravating circumstances to petitioner's case. Yet, without restraints or guidance, the jury was "free to act as arbitrarily and capriciously as (it wished) in deciding whether to impose the death penalty." Gregg, supra, 428 U.S. at 200.

C. Automatic Finding in Felony-Murder Cases:

The first aggravating circumstance found at petitioner's trial--that the capital murder was committed while the defendant was engaged in the commission of the crime of attempted robbery--has a similar constitutional defect. Because of the absence of any limitation on its application in a case where felony-murder is the capital offense, this aggravating circumstance will be, and has been, automatically found (see cases cited on page 18, supra).

This "automatic" aggravating circumstance again allows the jury unbridled discretion to impose the death sentence once it has found the defendant guilty of felony-murder. In the face of a clear possibility of arbitrary imposition of the death penalty in felony-murder cases, the Supreme Court of Mississippi has not attempted to provide guidance for juries by, for example, requiring "that when a defendant is convicted of (capital) murder under the felony-murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the felony-murder." State v. Cherry, 257 S.E.2d 551, 568 (N.C.1979). Thus the jury in Mississippi remains free to inflict the death sentence arbitrarily.

IV. Petitioner's Sixth Amendment Rights to Effective Assistance of Counsel, Compulsory Process and Trial by Jury were Denied when the Trial Court Overruled His Request for a Continuance to Obtain Critically Necessary Witnesses to Present His Defense to the Charge of Capital Murder.

Effective assistance of counsel was denied petitioner by the denial of his motions for continuance to obtain critically necessary witnesses who were essential to the presentation of his defense. "Few rights are more fundamental than the right of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973). The constitutional right to assistance of counsel guarantees every criminal defendant "effective aid in the preparation and trial of the case." Powell v. Alabama, 287 U.S. 45, 71 (1932)(emphasis added); accord: Anders v.

California, 386 U.S. 238 (1967)(effective assistance required on appeal).

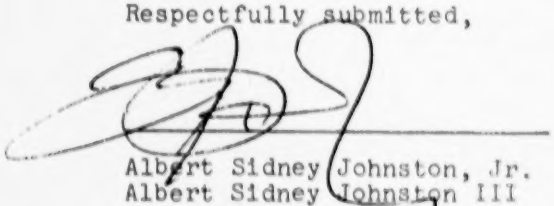
While fundamental fairness and effective assistance of counsel are required in every criminal proceeding, the need for such safeguards is particularly compelling in a capital case, since "death is a punishment different from all other sanctions in kind rather than in degree." Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976).

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of certiorari be granted.

Dated: June 2, 1980.

Respectfully submitted,



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APPENDIX A

RECEIVED
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Alvin CULBERSON

v.

STATE of Mississippi.

No. 50802.

Supreme Court of Mississippi.

Nov. 28, 1979.

Rehearing Denied Feb. 20, 1980.

After remand from the Supreme Court, 348 So.2d 1025, defendant was convicted in the Circuit Court, Harrison County, Leslie B. Grant, J., of capital murder and sentenced to death, and he appealed. On guilt-determining phase, the Supreme Court, Patterson, C. J., held that: (1) evidence including testimony of accomplice, was sufficient to sustain defendant's conviction; (2) indictment charging underlying crime of robbery and referring to capital murder statute was sufficient to apprise defendant of constituent charge against him; (3) trial court did not err in denying defendant's motion for continuance on ground that two of his witnesses were not present; (4) defendant was not denied right to testify in his own behalf; (5) alleged discrepancy between form of verdict suggested by trial court and form of verdict returned by jury did not preclude death sentence; and (6) felony-murder statute was not unconstitutional. On sentencing phase, the Court, Sugg, J., held that: (1) death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor; (2) evidence supported jury's finding of statutory aggravating circumstances; and (3) prosecutorial discretion was not abused because accomplice, who did not fire fatal shot, was permitted to plead guilty to manslaughter, while defendant, who fired fatal shot, was given death penalty.

Affirmed.

Walker, J., specially concurred in sentencing determining phase and filed opinion in which Robertson, P. J., and Sugg and Lee, JJ., concurred.

Patterson, C. J., dissented from sentence determining phase and filed opinion in which Smith, P. J., and Broom, J., joined.

Smith, P. J., dissented from sentence-determining phase and filed opinion in which Patterson, C. J., and Broom, J., joined.

1. Criminal Law ⇐510

An accused may be convicted on uncorroborated testimony of an accomplice.

2. Criminal Law ⇐508(9)

Although testimony of an accomplice, if unreasonable, improbable, self-contradictory or if impeached by an unimpeached witness, is not sufficient to carry burden of proof for conviction, reasonable explanation of contradictions may be offered, leaving evidence sufficient for jury's resolution if it accepts the explanation.

3. Homicide ⇐250

Evidence, including testimony of accomplice, was sufficient to sustain defendant's conviction of capital murder, even though a prior contradictory statement of the accomplice had been introduced into evidence.

4. Homicide ⇐138

Indictment for capital murder is sufficient if constituent offense is related to greater charge in indictment by language clearly informing indictee of underlying felony in which he was engaged, or its attempt, at time of the homicide. Code 1972, § 97-3-19(2)(e).

5. Homicide ⇐18(1)

Language "engaged in the commission of" in capital murder statute includes attempt to commit constituent felony, completed constituent felony, as well as immediate postfelony acts of the accused so connected to cardinal charge as to become a part of it, the res gestae. Code 1972, § 97-3-19(2)(e).

See publication Words and Phrases for other judicial constructions and definitions.

6. Indictment and Information ⇐71.4(5)

Indictment for capital murder charging robbery as the underlying felony was sufficient to apprise defendant of constituent charge against him even though testimony only related to an attempted robbery. Code 1972, § 97-3-19(2)(e).

7. Homicide ⇐128, 138

Capital murder indictment wherein underlying felony was attempted robbery and which included words "did wilfully kill" sufficiently alleged an intent and overt act as required for attempted crimes. Code 1972, § 97-3-19(2)(e).

8. Criminal Law ⇐603(7), 608

Defendant failed to satisfy statutory requirements governing granting or denial of a continuance in that his motion was not supported by affidavits and did not state with particularity material testimony expected from absent witnesses. Code 1972, § 99-15-29.

9. Criminal Law ⇐595(1)

In prosecution for felony-murder, trial court did not err in denying defendant's motion for continuance requested due to absence of witnesses where testimony which would have been presented by such witnesses only raised ambiguity concerning ownership of gun used in commission of the crime, and did not address possession of the gun when fatal shot was fired.

10. Witnesses ⇐88

Defendant, who first informed trial court of his desire to testify during hearing on his motion for a new trial, and who did not testify during his trial due to advice from his counsel, was not denied right to testify in his own behalf, particularly where record disclosed competent representation on behalf of defendant.

11. Criminal Law ⇐814(2)

Instructions for the State which did not assume as true any material fact but were based upon evidence and subjunctively stated in order to leave all factual conflicts to jury for resolution were properly granted.

12. Homicide ⇐312

In prosecution for capital murder, alleged discrepancy between form of verdict suggested by trial court and form of verdict returned by jury did not preclude death sentence where it was clear that jury's verdict "guilty as charged" meant "guilty of capital murder." Code 1972, § 97-3-19(2)(e).

13. Homicide ⇐351

Language "with or without any design to effect death" in capital murder statute did not render the statute unconstitutional by permitting imposition of death upon one who harbors no specific intent to kill since the statute places no limit upon mitigating factors that may be considered in capital sentencing process and since it includes minor role of defendant as a mitigating factor. Code 1972, §§ 97-3-19(2)(e), 97-3-21, 99-19-101.

See publication Words and Phrases for other judicial constructions and definitions.

14. Jury ⇐108

A challenge for cause may be properly sustained when a prospective juror indicates that he will automatically vote against imposition of capital punishment without regard to any evidence that might be developed, but he may be accepted as a juror if, in spite of his nonbelief in capital punishment, he can put such belief aside and follow law and evidence in accord with his oath to render a true verdict.

On Sentencing Phase

15. Homicide ⇐354

Defendant's prior kidnapping conviction should have been admitted as an aggravating circumstance in his sentencing after conviction for felony-murder, but its omission was immaterial since death penalty was imposed. Code 1972, § 97-3-19(2)(e).

16. Homicide ⇐354

Sentence of death imposed on defendant after conviction for murder was not imposed under influence of passion, prejudice, or any other arbitrary factor. Code 1972, § 99-19-105(3)(a).

17. Homicide ⇐354

Evidence resulting in defendant's conviction for capital murder supported jury's finding of statutory aggravating circumstances. Code 1972, §§ 99-19-105(3)(b), 99-19-101.

18. Homicide ⇐329

Statute requiring Supreme Court, in reviewing imposition of death penalty, to determine whether sentence of death is excessive or disproportionate to penalty imposed in similar cases includes not only cases having been determined by the Court in which death sentence had been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given death penalty and an accomplice less than death. Code 1972, § 99-19-105(3)(c).

19. District and Prosecuting Attorneys ⇐8

Prosecutorial discretion was not abused because accomplice, who did not fire fatal shot, was permitted to plead guilty to manslaughter while defendant, who fired fatal shot, was given death penalty. Code 1972, §§ 97-3-19(2)(e), 99-19-105(3)(c).

Albert Sidney Johnston, Jr., Biloxi, for appellant.

A. F. Summer, Atty. Gen., by Billy L. Gore, Special Asst. Atty. Gen., Jackson, for appellee.

EN BANC.

PATTERSON, Chief Justice, for the Court on the Guilt-Determining Phase; SUGG, Justice, for the Majority on the Sentence-Determining Phase.

Alvin Culberson was convicted of capital murder and sentenced to death by the Circuit Court of the First Judicial District of Harrison County. A similar verdict and sentence on the same charge were reversed and remanded in *Culberson v. State*, 348 So.2d 1025 (Miss.1977). We there directed a new trial with bifurcation pursuant to our

decision in *Jackson v. State*, 337 So.2d 1242 (Miss.1976). We presently affirm the guilty verdict.

The evidence adduced at Culberson's second trial sufficed to convince the jury of appellant's guilt. The state established through Alvarese Pittman, an accomplice, that he was with Culberson on January 31, 1975, when they met in a restaurant and schemed a robbery. In furtherance of their plan, Pittman and Culberson left the restaurant seeking a victim, and as they walked along a highway, Culberson picked up a stick, a table leg, believed to be needed for their purpose. Pittman's testimony concerning their intentions and the stick follows in part:

Q. What did you all talk about?

A. Well, we was sitting there and Alvin came, and we just started about robbing somebody. He was broke and I was broke. We wasn't looking for nobody in particular to rob, we was just walking up towards Old Highway 49, and on our way up toward Old Highway 49 we saw a Frito truck in front of the Beverly Lounge. We was walking that way, and alongside the ditch was a table leg, a stick and Alvin picked the stick up and we went on up to the Club.

* * * * * *

Q. What were you going to do?

A. Going to knock the man out with the stick.

Q. And do what?

A. Rob him. After we knocked him out we was going to get his money.

Q. Whose idea was it to commit this robbery?

A. Alvin's. It was both, I agreed with him.

Just before obtaining the stick or immediately afterward, Pittman and Culberson observed a delivery truck parked in front of the "Beverly Lounge" business establishment. They also saw someone, their prospective victim, leave the lounge and move toward the truck when the following occurred, according to Pittman:

Q. Now, as you approached the man, the two of you, tell the Court and jury what took place.

A. Alvin spoke and I spoke, and he spoke back.

Q. Where was the man at this time?

A. He was about ten or fifteen feet, between ten and fifteen feet from the door, going to the truck.

Q. From the door of the Beverly Lounge?

A. Yes, going back to the truck. I guess he was going to get his order.

Q. And then what happened?

A. We spoke and by the time we got past him— .

Q. Did the man speak back?

A. Yes, sir.

Q. Was it any kind of arrogant speaking?

A. It was just a normal hello, how're you doing. And Alvin turned around and hit the man in the back of the neck with the stick, which he intended to knock him out. He knocked him down but he didn't knock him out, and the man fell on the ground and begged him, throwed up his hands and hollered for help.

Q. What did the man say when he fell to the ground?

A. He hollered for help.

Q. What did the man say? Just tell the jury what he said.

A. He said "help, help me", and by that time Culberson pulled out the gun and shot him, and I said "what you done done, man? Let's go", and we took off running and run toward the Tims Motel and I slipped down going in the door, and I got back up and ran, and we got away.

Pittman also testified he was not aware that Culberson was armed with a pistol and would not have accompanied him had he known so.

Only Pittman and Culberson witnessed the shooting although others heard the shot and saw two men leaving the scene. While these witnesses could describe the general appearance and clothing of the fleeing men, none could identify Culberson as one of the

men they observed on the occasion. The remainder of the state's evidence concerned the death of Grady Evans by a bullet wound, pictures of the scene and other requisites to establish the corpus delicti. Culberson did not testify.

I.

[1] The appellant contends his conviction is contrary to the weight of the evidence. This argument has little merit, in our opinion. It is well established in our jurisprudence that an accused may be convicted on the uncorroborated testimony of an accomplice. *Rich v. State*, 322 So.2d 468 (Miss.1975); *Moore v. State*, 291 So.2d 187 (Miss.1974); *Young v. State*, 212 Miss. 460, 54 So.2d 671 (1951); *Larry v. State*, 211 Miss. 563, 52 So.2d 292 (1951); *Boutwell v. State*, 165 Miss. 16, 144 So. 479 (1932); *Matthews v. State*, 148 Miss. 696, 114 So. 816 (1927).

[2] While it is true the testimony of an accomplice must be considered with caution, *Feranda v. State*, 267 So.2d 305 (Miss.1972), the record here demonstrates that Pittman's testimony is neither unreasonable nor uncorroborated. The photographs, the physical facts, corroborate Pittman in every important particular. Although the testimony of an accomplice, if unreasonable, improbable, self-contradictory or if impeached by an unimpeached witness, is not sufficient to carry the burden of proof for conviction, *Feranda, supra*, we nevertheless think reasonable explanation of contradictions may be offered, leaving the evidence sufficient for the jury's resolution if it accepts the explanation.

[3] In cross-examining Pittman, a prior contradictory statement consisting of an affidavit executed by Pittman while in prison was introduced into evidence. He swore in it that he did not see Culberson shoot anyone. The contradiction was explained by him as being the result of fear because he thought there was a "contract" on his life while he was incarcerated. He disclaimed the truth of the affidavit from the witness stand and reaffirmed that Culberson was the person who killed Evans. The jurors resolved the truthfulness of the different statements by accepting the accomplice's last version after being properly instructed that an accomplice's testimony must be regarded with caution and suspicion. We are of the opinion the jury had the right to accept as true Pittman's current testimony. As stated, there was sufficient evidence to sustain the jury's verdict.

II.

Culberson next contends the testimony at trial varied from the indictment, requiring reversal. The indictment follows in part:

> That ALVERREECE PITTMAN AND ALVIN CULBERSON . . . on or about the 31st day of January in the year of our Lord, 1975, . . . did unlawfully, wilfully & feloniously, with malice aforethought, kill and murder one Grady V. Evans, a human being, while engaged in the commission of robbery upon him, in violation of Section 97-3-19, Sub-Section 2(e), Mississippi Code of 1972, as amended, . . .

The statute on capital murder referred to in the indictment states in part:

> § 97-3-19.
>
> • • • • • •
>
> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> • • • • • •
>
> (e) When done with or without any design to effect, by any person engaged in the commission of the crime of . . robbery, or in any attempt to commit such felonies, . . .

[4-6] Culberson's initial argument is that the indictment charged robbery whereas the testimony only relates to an attempted robbery. Subsection 2(e) appears in the indictment as an exact reference to the constituent violation with which the appellant is charged. The statutory language, "engaged in the commission of the crime of . . . robbery," which coincides with that of the indictment, "while engaged in

the commission of robbery," is sufficiently comprehensive, in our opinion, to include the attempt. The legislative intention in elevating a homicide from murder to capital murder was upon the basis that it be committed during the commission of one of the felonies enumerated in the statute, rape, burglary, kidnapping, arson or robbery. It is enough if the constituent offense is related to the greater charge in the indictment by language clearly informing the indictee of the underlying felony in which he was engaged, or its attempt, at the time of the homicide. In our opinion, the statutory language, "engaged in the commission of," includes the attempt to commit the constituent felony, the completed constituent felony, as well as the immediate post-felony acts of the accused so connected to the cardinal charge as to become a part of it, the res gestae. *Pickle v. State*, 345 So.2d 623 (Miss.1977); *Lipscomb v. State*, 223 Md. 599, 165 A.2d 918 (1960); *MacAvoy v. State*, 144 Neb. 827, 15 N.W.2d 45 (1944). The language of the indictment was sufficient to apprise Culberson of the constituent charge against him, thereby enabling him to prepare a defense to it, if any he had.

[7] The appellant next suggests the indictment is defective because it does not allege an intent and overt act as required for attempted crimes, citing *Dill v. State*, 149 Miss. 167, 115 So. 203 (1928), and *Miller v. State*, 130 Miss. 730, 95 So. 83 (1922). We cannot agree, because the indictment clearly states that Culberson did willfully kill a human being, etc. The words, "did willfully kill," mean the completed act of homicide which also necessarily means there was an overt act sufficient to accomplish that result. We reject this contention by repeating the indictment is clear, unambiguous and was sufficient to inform the appellant of the constituent offense with which he was charged.

III.

On October 17, 1977, the day before the testimony in the trial got under way, defendant moved for a continuance because two of his witnesses were not present though subpoenas had been issued for them. He urged their testimony was necessary to a proper defense. No pretrial ruling on the motion appears, but at the conclusion of the first day's testimony, defendant again moved for a continuance since the subpoenas for the witnesses had been returned "not found." The court overruled the motion but directed the sheriff to continue his efforts to find the witnesses. The motions were twice renewed and overruled during the trial.

The motions arose once more when the defendant moved for a new trial after verdict and sentence. At that time defense counsel stated the absent witnesses would have shown appellant to be innocent of the charge against him. Five prospective witnesses were named, only one of whom appeared at the hearing to testify in appellant's behalf that day. The hearing continued the next day when three of the missing witnesses appeared.

The first, Cora Thompson, testified in part as follows:

Q. I ask you, Cora, if you know Alverese Pittman?

A. Yes.

Q. Did you see him on or about January 31, 1975?

A. Yes.

* * * * * *

Q. What did he ask you, if you remember, about did you notice anything about a killing?

A. Well, he didn't ask me. He showed me that Club, the Blue Light Club, and he said "you heard about the man that got killed in North Gulfport? And I said "yes", and he said "Do you know who killed him"? And I said "No", and he pointed to himself.

Q. I ask you, Cora, if you know whether or not Alverese had a pistol?

A. Yes.

Q. Did he show it to you?

A. Yes, I have seen the pistol he had before.

Q. Had you seen the pistol before the shooting?

A. Yes, I saw it before the killing.

Q. And afterwards too?

A. No, I didn't see it afterwards.

Q. Do you remember what kind of pistol it was?

A. Yes.

Q. How was it identified in your mind?

A. It was a .22 with black tape around the handle of it.

Q. I show you a pistol that has been offered in evidence in this case, and ask you if you have seen that before?

A. Yes, that's the gun.

Q. That's the gun that Alverese showed you?

A. Yes.

Q. And did he have that gun on the 31st day of January, 1975?

A. I don't know.

The next witness, Jackie Skinner, related testimony concerning the whereabouts of Leon Mills, the remaining witness subpoenaed by the defense who had not yet appeared to testify.

The third, D. Robinson, stated that in March 1975, he approached a man named "Slick" at appellant's request and received from him a package containing the gun that had been introduced into evidence through Cora Thompson. Robinson testified he delivered the package to a Mrs. Brumfield, appellant's mother, as he had been directed to do. Robinson was unsure who owned the gun and could not remember seeing Pittman with it. The identity of "Slick" remains a mystery.

[8] By Mississippi Code Annotated section 99-15-29 (1972) the granting or denial of a continuance is within the discretion of the trial judge. Appellant failed to satisfy the requirements of the statute in that his motion was not supported by affidavit and did not state with particularity the material testimony expected from the absent witnesses.

[9] All but one of these witnesses eventually testified on the motion for a new trial. Their testimony, summarized above, hardly adds a new dimension to appellant's case, in our opinion, although it must be acknowledged that Cora Thompson's testimony about Pittman's demonstration could have possibly affected his credibility. Otherwise, her testimony, when considered with that of Skinner and Robinson, only raises an ambiguity concerning the ownership of the gun. It does not address the possession of the gun when the fatal shot was fired. Under these circumstances and the commonplace knowledge of the continuance statute, we conclude there was no error in denying defendant's motion for a continuance. *Dyer v. State*, 300 So.2d 788 (Miss.1974); *Saucier v. State*, 259 So.2d 484 (Miss.1972); and *Ford v. State*, 227 So.2d 454 (Miss.1969).

IV.

[10] Appellant next argues that he was denied the right to testify in his own behalf. The first time the court was informed the appellant desired to testify was during the hearing on the motion for a new trial. Culberson testified he had not been a witness at his first trial because his counsel had informed him it was not necessary. He stated that he did not take the stand during his second trial because his counsel had told him "[w]ell, just hold on," and he never got a chance to testify.

The trial court did not refuse any request by appellant to testify simply because no such request was ever made. For this reason, *Gray v. State*, 351 So.2d 1342 (Miss. 1977), is readily distinguishable. There, at the close of the guilt-determining phase, the court explicitly denied the accused the right to make a statement to the jury as our constitution permits. Here, appellant's counsel intentionally kept Culberson off the stand, not an unwise trial tactic it would seem, in view of appellant's several prior convictions which could have been exposed had he become a witness.

Culberson's family retained an attorney of considerable trial experience and good judgment to represent him. We have previously held that one who retains his own attorney waives his right to complain of his

competency. *Rogers v. State*, 307 So.2d 551 (Miss.1975); *Miller v. State*, 231 So.2d 178 (Miss.1970). We think this particularly true when, as here, the record discloses competent representation on behalf of the defendant.

V.

It is next argued that four instructions proffered by the state were improperly granted and three proffered by Culberson were improperly refused.

Appellant concedes his trial counsel did not object to the state's instructions as required by Mississippi Supreme Court Rule 42. Appellate counsel argues, however, that we should deem this an extreme case and waive strict application of Rule 42 as we did in *Toney v. State*, 298 So.2d 716 (Miss.1974). We do so with reluctance and only because this is a capital case.

[11] In contrast with *Marble v. State*, 195 Miss. 386, 15 So.2d 693 (1943), the instructions for the state did not assume as true any material fact, but were based upon the evidence and subjunctively stated in order to leave all factual conflicts to the jury for resolution. *Compare Dickins v. State*, 208 Miss. 69, 94, 43 So.2d 366 (1949). The remainder of the criticisms of the state's instructions only reiterate that the weight of the evidence does not support the verdict. We have rejected this argument heretofore and do not repeat it.

We are further of the opinion Instruction D-2 was properly refused. Although it might have been proper in a circumstantial evidence case, *Barrett v. State*, 253 So.2d 806 (Miss.1971), the record here does not reveal circumstantial evidence but rather the direct testimony of an accomplice concerning the occurrence.

Instruction D-3 was also properly refused. It has been condemned by this Court for various reasons on several occasions. *Dubose v. State*, 320 So.2d 773 (Miss.1975); *Wells v. State*, 288 So.2d 860 (Miss.1974); and *Carr v. State*, 192 Miss. 152, 4 So.2d 887 (1942).

Lastly, Instruction D-10 was properly refused because it is peremptory for the defendant and raises once more the issue of the sufficiency of the evidence which we have heretofore addressed.

VI.

The second trial was confined in the first phase to Culberson's guilt or innocence of capital murder. Before voir dire, the trial judge made the following statement to the prospective jurors:

> In these cases now the jury first determines whether or not the defendant is guilty of the charge. Then if you do decide he is guilty, there will be another hearing on the question of the sentencing, but for the time being you are only concerned with the question of whether or not the defendant is guilty of the charge.

At the conclusion of the first phase, the jurors were instructed their verdict might take the following form: "We, the jury, find the defendant guilty of capital murder." After deliberating for two hours and forty-three minutes, they returned a verdict which read: "We, the jury, find the accused guilty as charged."

[12] *Williamson v. State*, 167 Miss. 783, 149 So. 795 (1933), is cited in support of the argument that a discrepancy between the form of the verdict suggested by the court and the form of the verdict returned by the jury precludes the death sentence. This case has no application to a bifurcated trial and is not persuasive. Court records reveal identical verdict forms in the following capital cases: *Caldwell v. State*, 347 So.2d 1389 (Miss.1977); *Henderson v. State*, 342 So.2d 744 (Miss.1977); and *Jackson v. State*, 337 So.2d 1242 (Miss.1976). Furthermore, in *Ellard v. State*, 248 Miss. 313, 158 So.2d 690 (1963), we stated and adopted:

> " 'The general rule as found in the texts is, that ordinarily the verdict is sufficient in form if it expresses the intent of the jury so that the court can understand it, 22 Eng.Pl. & Pr., p. 891; or that the test of the validity of a verdict is whether or not it is an intelligible answer to the issues submitted to the jury . . . .' "
> (248 Miss. at 318-19, 158 So.2d at 692)

Presently, we do not understand the verdict to deviate from the jury's clear intention. Moreover, no effort was made by the defendant to clarify the alleged discrepancy; the judge polled the jury, and each juror acknowledged the verdict reflected his or her vote, and none expressed any doubt about the verdict prior to or during the punishment phase of the trial. It is convincingly clear to us that the jurors understood "guilty as charged" to mean "guilty of capital murder." The difference argued gives rise only to a distinction without meaning, in our opinion.

VII.

The next issues concern the constitutionality of the felony murder statute and the propriety of the death sentence.

(a)

[13] Appellant contends the felony murder statute, Mississippi Code Annotated section 97-3-19(2)(e) cannot pass constitutional scrutiny because the language "with or without any design to effect death" permits imposition of death upon one who harbors no specific intent to kill. We rejected a similar argument in *Gray, supra*, but express further views.

All states have endorsed the common-law concept of felony murder in some form. In it the felon is considered "at risk" while committing the felony so that if a homicide results, it is considered murder, or, as in our state, capital murder if associated with the felonies, designated by the legislature. The legislature's intent was to protect the citizenry from the evil of the lesser felony by imposing a greater penalty upon a homicide occurring during its commission. Some authorities view the felony murder statutes as imputing or irrebuttably presuming a specific intent to kill from the association of the homicide with the underlying felony. These same authorities acknowledge "[l]ong standing judicial approval of the presumption provides strong indication that the presumption comports with due process." Comment, Constitutional Limitations Upon the Use of Statutory Criminal Presumptions in the Felony Murder Rule, 46 Miss. L.J. 1021, 1035 (1975); *see also Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

The appellant argues, however, that only 0.5% of robberies result in homicide. Therefore, it cannot be said the robber in every case intended to kill. This may be true, but we think it overlooks the great danger the aggressor willfully imposes upon his victim. The constituent crime with its hazardous potential is that which the legislature intended to deter by permitting capital punishment if death results from the felonious undertaking.

Presently, we can say without doubt the appellant schemed and participated in the unlawful undertaking which resulted in death. The subjunctive nature of the intention to kill makes it no less deliberate and no less deserving of capital punishment than if it had been expressed, in our opinion. The felon who causes death in furthering his crime manifests a callous disregard for human life, because he subordinates the life of the innocent to his desire for gain, thereby inviting the outrage of a society understandably bent upon protecting itself from physical violence.

As far as we can determine, the United States Supreme Court has not held a statute unconstitutional simply because it permits the death penalty to be imposed without affirmative proof of a specific intent to kill. In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court considered a case in which a young woman had been sentenced to death for her role in an armed robbery in which a pawnshop owner was killed by her accomplice. She was not in the pawnshop when the shooting occurred. Nevertheless, the Court did not hold the death penalty unconstitutional per se, but reversed only because the Ohio capital punishment statute improperly limited the mitigating factors to be considered in the sentencing process to certain narrowly defined factors, not including the minor role of the defendant among partners in crime. Only Mr. Justices Brennan and White considered the death penalty per se unconstitutional in felony murder cases in which af-

firmative evidence of a specific intent to kill has not been made.

Our statute places no limit upon the mitigating factors that may be considered in the capital sentencing process, and since it includes the minor role of the defendant as a mitigating factor, we conclude it suffers no constitutional infirmity under *Lockett*. See Miss.Code Ann. § 97-3-21 (Supp.1977), as construed in *Jackson v. State*, 337 So.2d 1242, 1254 (Miss.1976); and Miss.Code Ann. § 99-19-101 (Supp.1977).

(b)

[14] Following the preferred practice, the trial court retained the jury used in the guilt phase for the second phase directed to punishment. Defendant complains the court permitted improper *voir dire* of the venire, arguing that a "death prone" jury emerged after challenges by the state eliminated those opposed to capital punishment. We do not have the full transcript of the *voir dire* conducted by the parties before us and therefore cannot address this point in detail. However, we do note that a challenge for cause may be properly sustained when a prospective juror indicates that he will automatically vote against the imposition of capital punishment without regard to any evidence that might be developed. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Spinkellink v. Wainwright*, 578 F.2d 582, 592-93 (5th Cir. 1978). Conversely, he may be accepted as a juror if in spite of his nonbelief in capital punishment he can put such belief aside and follow the law and evidence in accord with his oath to render a true verdict.

After deliberation, the Court is unanimous in its opinion that the jury's verdict of guilty and the trial procedures leading to it should be affirmed.

THE SENTENCING PHASE

SUGG, Justice, for the Majority:

All justices concur in what has been written by Justice Patterson for the Court but there is some disagreement among the justices on the question of whether the death penalty should be affirmed. A majority of the justices are of the opinion the death penalty should be affirmed. The views of the minority are expressed in a dissent by Justice Patterson.

The record covering the sentencing phase spans some forty-four pages. The state introduced aggravating circumstances consisting of prior criminal convictions of armed robbery and assault and battery with intent to kill. The state objected to the exclusion of evidence of a kidnapping conviction and cross-assigns this exclusion as error on appeal. In instructing the jury the court limited the aggravating circumstances which might be considered in sentencing to (1) whether the offense occurred in the commission of an attempted robbery, (2) whether the offense was especially heinous, atrocious, or cruel, and (3) whether the defendant had previously been convicted of felonies involving the use or threat of violence to the person. The court, in compliance with *Lockett*, *supra*, 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990, in no way constrained the jury with respect to the number or quality of mitigating circumstances which might be considered in appellant's favor.

[15] The sentencing phase progressed without procedural error, in our opinion, although we do think the kidnapping conviction should have been admitted as an aggravating circumstance. It was not admitted out of precaution by the court, because a colloquy had arisen between the attorneys as to whether kidnapping is a crime of violence. Presently, its omission is immaterial, because the death penalty was imposed.

By Mississippi Code Annotated section 99-19-105 (Supp.1978) the legislature mandated this Court to review the imposition of the death penalty. It follows in pertinent part:

> (1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.
(3) With regard to the sentence, the court shall determine:
(a) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and
(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

* * * * * *

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(a) Affirm the sentence of death; or
(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.
(6) . . . The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

[16] In response to Subsection (3)(a) above, the Court is of the opinion the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

[17] In response to Subsection (3)(b) above, the Court is of the opinion the evidence does support the jury's finding of the statutory aggravating circumstances as enumerated in Section 99-19-101.

In response to Subsection (3)(c) above, the Court is of the opinion the sentence of death is not excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. This response requires amplification.

Heretofore, this Court's review of punishment has been largely confined to the ascertainment of whether the sentence was within the limits of the statute. If no prejudicial error was found in the trial proceedings, the sentence, if within such limits, would be upheld. The mandate of Section 99-19-105 is novel, because it places this Court in the stream of the punishment process by requiring that we determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. In complying with the reviewing role which we now occupy in this and other death imposed cases, we have reviewed the following capital cases in which we have rendered dispositive decisions affirming death sentences and setting dates for executions: *Gray v. State*, 375 So.2d 994 (Miss.1979); *Jordan v. State*, 365 So.2d 1198 (Miss.1979); *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Washington v. State*, 361 So.2d 61 (Miss.1978); and *Bell v. State*, 360 So.2d 1206 (Miss.1978).

Our research reveals that in none of these cases does a death sentence rest solely upon the testimony of an admitted accomplice who has given state's evidence and received a sentence of manslaughter when by his own admission he was an accomplice to capital murder. A somewhat similar case is *Voyles, supra*, in which a conviction and death sentence depended upon a young witness who was present when the crime occurred, but who denied any participation in the homicide committed by his uncle, thereby creating, we think, a distinction between that case and this.

The record here reveals that Pittman participated in the constituent felony from its inception until Evans was killed. He did not deny this participation, but acknowledged it in detail, only claiming he was not aware Culberson carried a firearm and would not have accompanied him had he known so. Pittman admitted his willing participation in the crime through the blow being struck with the table leg to render the victim unconscious. He qualified his role in the capital murder by denying he intended homicide or knew that such was imminent. It is clear, however, that this qualification does not relieve Pittman of his

confessed guilt of the crime of capital murder. *Price v. State*, 362 So.2d 204 (Miss. 1978).

[18] This leaves the question of whether the words in Subsection (3)(c), "imposed in similar cases, considering both the crime and the defendant," include for our review and comparison the exact and therefore similar crime of the accomplice and the sentence received by him for it. We construe the language to include not only the capital cases heretofore determined by this Court in which the death sentence has been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given the death penalty and an accomplice less than death. One of the questions arising in such cases is whether a sentence of less than death to an accomplice was a result of prosecutorial discretion. An affirmative answer raises a second question, was the discretion abused?

The proof in this case shows that Pittman and Culberson conspired to commit robbery and participated in the attempted robbery of decedent with Culberson firing the fatal shot. It was established by other witnesses that there were two assailants, but none of the witnesses could identify either Pittman or Culberson as the assailants. Pittman, one of the participants in the crime, turned state's evidence, and his testimony was the sole evidence that Culberson fired the fatal shot.

This case involves prosecutorial discretion which was necessary. Without the testimony of Pittman, there was no evidence to place Culberson at the scene of the crime and to show that he fired the fatal shot. We recognize the great disparity between the sentences of Pittman and Culberson, but if the state is not permitted to exercise prosecutorial discretion in order to obtain the testimony of a participant in a capital murder by permitting the one furnishing the testimony to plead guilty to a lesser crime, crimes such as the one in this case would not be solved and all participants would go free. When two or more persons commit a crime and cannot be identified except by one of the participants, the state must be allowed some discretion in securing the testimony of one of the participants in order to solve the crime.

To hold otherwise would be tantamount to holding: (1) The testimony of an accomplice in a capital murder case is sufficient to sustain a conviction in the guilty phase of the trial, but is not sufficient to sustain the death penalty in the sentencing phase. (2) If an accomplice who testifies for the state in a death penalty case is not given the death penalty, the trigger man may not be given the death penalty. Such result is not required by our statutes, the decisions of the United States Supreme Court, or our decisions.

[19] We hold prosecutorial discretion was not abused because Pittman, who did not fire the fatal shot, was permitted to plead guilty to manslaughter, while Culberson, the one who fired the fatal shot, was given the death penalty. We hold the death penalty was not applied capriciously in this case. It is a proper sentence for the senseless and unprovoked murder committed by Culberson, who, after first knocking the victim down with a table leg, then shot the victim while he was lying on the ground begging, "Help me, help me."

AFFIRMED, AND EXECUTION SET FOR JANUARY 10, 1980.

All Justices concur in guilt-determining phase. In sentence-determining phase.

ROBERTSON, P. J., and WALKER, LEE, BOWLING and COFER, JJ., concur.

WALKER, J., ROBERTSON, P. J., SUGG and LEE, JJ., specially concur.

PATTERSON, C. J., SMITH, P. J., and BROOM, J., dissent.

WALKER, Justice, specially concurring:

I concur with the majority on both the guilt and sentencing phase of Culberson's trial as well as the verdict and sentence imposed. However, I feel constrained to comment on the necessity and propriety of prosecutorial discretion which resulted in the disparity between the sentences of Pitt-

man and Culberson, who were both originally charged with capital murder. Culberson received the penalty of death while Pittman was sentenced to fifteen years in the penitentiary.

Prosecutorial discretion is absolutely necessary and an essential element of our system of criminal jurisprudence. Without it, the courts of this Country would be hopelessly bogged down in a backlog of cases and the cost of court administration would be astronomical.

The United States Supreme Court has not yet, nor do I anticipate that it will ever hold that the practice of prosecutorial discretion is so inherently unfair as to render its practice unconstitutional. The practice and necessity of prosecutorial discretion has been alluded to by a number of the justices of the United States Supreme Court beginning with *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), wherein the newly enacted statutory provisions relative to death penalty cases were upheld. In that case Mr. Justice White, with whom Mr. Chief Justice Burger and Mr. Justice Rehnquist joined, made the following observation:

> Petitioner also argues that decisions made by the prosecutor—either in negotiating a plea to some offense lesser than capital murder or in simply declining to charge capital murder—are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*. I address this point separately because the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.
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> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.
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> Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to

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AFFIRMED, AND EXECUTION SET FOR JANUARY 10, 1980.

All Justices concur in guilt-determining phase. In sentence-determining phase.

ROBERTSON, P. J., and WALKER, LEE, BOWLING and COFER, JJ., concur.

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explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1973), Mr. Justice Stevens, speaking for the Court, said:

> The petitioner first asserts that arbitrariness still pervades the entire criminal system of Texas—from the prosecutor's decision whether to charge a capital offense in the first place and then whether to engage in plea bargaining, through the jury's consideration of lesser included offenses, to the Governor's ultimate power to commute death sentences. This contention fundamentally misinterprets the *Furman* decision, and we reject it for the reasons set out in our opinion today in *Gregg v. Georgia*, [428 U.S. 153,] at 199, 96 S.Ct. 2909 [at 2937], 49 L.Ed.2d 859.

At the same term of court, in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), it was argued, *inter alia*, that prosecutorial discretion would result in arbitrary sentences and therefore be unconstitutional. Justice White, in a dissenting opinion, joined by Mr. Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist, observed:

> Nor am I convinced that the Louisiana death penalty for first-degree murder is substantially more vulnerable because the prosecutor is vested with discretion as to the selection and filing of charges, by the practice of plea bargaining or by the power of executive clemency. Petitioner argues that these characteristics of the criminal justice system in Louisiana, combined with the discretion arguably left to the jury as discussed above, insure that the death penalty will be as seldom and arbitrarily applied as it was under the predecessor statutes. The Louisiana statutes, however, define the elements of first-degree murder, and I cannot accept the assertion that state prosecutors will systematically fail to file first-degree murder charges when the evidence warrants it or to seek convictions for first-degree murder on less than adequate evidence. Of course, someone must exercise discretion and judgment as to what charges are to be filed and against whom; but this essential process is nothing more than the rational enforcement of the State's criminal law and the sensible operation of the criminal justice system. The discretion with which Louisiana's prosecutors are invested and which appears to be no more than normal, furnishes no basis for inferring that capital crimes will be prosecuted so arbitrarily and infrequently that the present death penalty statute is invalid under *Furman v. Georgia*.
>
> I have much the same reaction to plea bargaining and executive clemency. A prosecutor may seek or accept pleas to lesser offenses where he is not confident of his first-degree murder case, but this is merely the proper exercise of the prosecutor's discretion as I have already discussed. So too, as illustrated by this case and the North Carolina case, *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, some defendants who otherwise would have been tried for first-degree murder, convicted, and sentenced to death are permitted to plead to lesser offenses because they are willing to testify against their codefendants. This is a grisly trade, but it is not irrational; for it is aimed at insuring the successful conclusion of a first-degree murder case against one or more other defendants. Whatever else the practice may be, it is neither inexplicable, freakish, nor violative of the Eighth Amendment. Nor has it been condemned by this Court under other provisions of the Constitution. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct.

1458, 25 L.Ed.2d 785 (1970); *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). See also *Chaffin v. Stynchcombe*, 412 U.S. 17, 30-31, 93 S.Ct. 1977, [1984,] 36 L.Ed.2d 714 (1973). *See also Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978).

In cases where a prosecuting attorney must resort to plea bargaining in order to obtain the cooperation of one or more accomplices in a brutal killing such as the one before us in order to convict other culprits to the crime, we must assume, unless there is evidence to the contrary, that he acted in good faith and in the best interest of the state. In those instances, we are unable to and should not attempt to compare the sentence of the cooperating accomplice or accomplices with other defendants who denied their guilt, placed their fate in the hands of a jury and received the death penalty. The rationale being: (1) the accomplice has confessed his guilt and placed himself on the mercy of the court; (2) he has cooperated with the state by giving important testimony resulting in his accomplice's conviction and sentence, who might have otherwise gone free; and (3) we have no way of knowing what mitigating circumstances were considered by the district attorney in selecting a particular codefendant for plea bargaining. Since it was not necessary to put the plea-bargaining accomplice to trial, we have no reliable record of witnesses testifying under oath with reference to such accomplice's criminal disposition or mitigating factors in his favor to consider as we are required to do. It cannot be seriously argued that every accomplice should receive the death penalty in cases where it is imposed on one of the participants to a crime. There are too many factors which must be considered when dealing with individuals for such a rule to be practical, such as the age, the degree of participation in the crime of each of the defendants, prior criminal record or lack of it, mentality, as well as other factors too numerous to mention.

In my view, it is the primary duty of this Court, when reviewing death penalty cases, to see that it is only imposed in the most severe cases involving the brutal, heinous and unnecessary killing of a human being. We have done this in all of the death penalty cases coming to this Court since *Jackson v. State*, 337 So.2d 1242 (Miss.1976); *Bell v. State*, 360 So.2d 1206 (Miss.1976); *Washington v. State*, 361 So.2d 61 (Miss.1978); *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *Jordan v. State*, 365 So.2d 1198 (Miss.1979); and *Gray v. State*, 375 So.2d 994 (Miss. 1979). To place any greater burden on the Court would only be requiring it to attempt the impossible. There have never been two identical crimes involving defendants with identical characteristics and I venture to say there never will be.

We must be careful, lest we impose so many restrictions, impossible of reasonable application, that the death penalty statutes will be, for all practical purposes, nullified. That is a matter for the legislature and not the courts.

The death penalty in this case was properly affirmed.

ROBERTSON, P. J., SUGG and LEE, JJ., concur.

PATTERSON, Chief Justice, dissenting:

I dissent from the majority decision to affirm the death sentence. I do so because of my belief that justice requires a more proportionate sentence, "considering both the crime and the defendant," prescribed by Mississippi Code Annotated section 99-19-105(3)(c).

Alvin Culberson and Alvarese Pittman planned an armed robbery that resulted in a homicide. Although Culberson and Pittman were both indicted for capital murder, an offense for which they could have been put to death, Pittman was permitted to plead guilty to manslaughter for which he received a fifteen-year sentence and served only two and one-half years.

We have no record of the transaction, but apparently Pittman was accorded this singular treatment by the state in exchange for his testimony, the result being to lift from his shoulders the awesome burden of a

probable death sentence. Consideration as dear as life, in my opinion, leaves the testimony for which it was given as questionable as if it had been purchased with cash. The dubious quality of Pittman's testimony is compounded by his admission of perjury in making a false affidavit concerning the homicide. His testimony is too suspect to permit us justly, in my opinion, to ignore the disparity of sending one man to the gas chamber while his confessed accomplice roams free after two and one-half years of confinement. I think the termination of life by the state should rest upon a firmer basis and should not portray the appearance of such gross disproportions.

I do not share the apprehensions of the majority that prosecutorial discretion will be abolished by imposing a life sentence upon Culberson, nor do I think we will establish a rule that an accomplice can never be sentenced to death by imposing such sentence. The statute mandates a review of each case upon an individual basis, and I would restrict the views I have expressed to the peculiar circumstances of this case.

In conclusion, I would reverse for the imposition of a life sentence.

SMITH, P. J., and BROOM, J., join in this dissent.

SMITH, Presiding Justice, dissenting:

I concur in the conclusion reached by Chief Justice Patterson in his dissent. The extreme leniency extended to Culberson's accomplice, a confessed participant in the murder for which Culberson stands sentenced to die, presents an unacceptable disparity in the consequences visited upon these joint actors. Death for Culberson and a brief confinement for his accomplice reflects treatment approaching a denial of equal protection of the laws and which, in my judgment, is incapable of being justified by the practical necessities of what has become known as plea bargaining.

The conviction of Culberson rests, in substantial part, upon the testimony of the accomplice. This Court, in an unbroken line of decisions, extending back over many years, has adhered to the rule that testimony of an accomplice is to be viewed with caution and suspicion, although it may be sufficient to support a conviction. The sound reasons for the rule are set out in the many cases dealing with the subject and will not be repeated here.

A short imprisonment for the accomplice, who has confessed his guilt, and death for Culberson, who declined to plead guilty and whose conviction rests in large part upon the testimony of the accomplice, presents a situation which possibly may be warranted in some future case presenting different circumstances which might be found to justify it. But here, considering, as we must, the defendant, the crime, the nature of the evidence upon which the defendant was convicted, and all of the circumstances of the case, I am forced to conclude that Culberson's conviction should stand but that he should not be put to death.

PATTERSON, C. J., and BROOM, J., join in this dissent.

Supreme Court of the United States

No. A-1015

ALVIN CULBERSON,

Petitioner,

v.

MISSISSIPPI

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 4, , 19 80, without prejudice to the Court's consideration of whether this application has been filed in time.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 23
day of May, 19 80.

Appendix B

§97-3-19. Homicide--murder defined--capital murder.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriff of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

§97-3-21. Homicide--penalty for murder or capital murder.

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the state penitentiary.

Every person who shall be convicted of capital murder shall be sentenced to death or to imprisonment for life in the state penitentiary.

§99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in sub-

section (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

99-19-105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to the authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

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NO. 79-6715

ALVIN CULBERSON,
Petitioner

VERSUS

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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IV. PETITIONER'S SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, COMPULSORY PROCESS, AND TRIAL BY JURY WERE NOT DENIED WHEN THE TRIAL COURT OVERRULED HIS REQUEST FOR A CONTINUANCE. 46

Hardy v. United States, 186 U.S. 224 (1902) 49
Henry v. Mississippi, 479 U.S. 443, 447 (1965)---------- 46
Street v. New York, 394 U.S. 576, 582 (1969)---------- 50
Wainwright v. Sykes, 433 U.S. 72 (1977)---- 46

CONCLUSION---------- 50

CERTIFICATE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1979 TERM

NO. 79-6715

ALVIN CULBERSON,
Petitioner

VERSUS

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

I. PREFACE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered on November 28, 1979, affirming his conviction for capital murder and declining to vacate his sentence of death.

Petitioner, on a former day, had received a jury trial sans bifurcation in the Circuit Court of Harrison County, Mississippi. He was found guilty as charged and sentenced to death. The Supreme Court of Mississippi, on August 10, 1977, reversed and remanded for a retrial with bifurcated aspects in accordance with its decision in Jackson v. State, 337 So.2d 1242 (Miss. 1976), requiring two stage trials in death penalty cases. SEE: Culberson v. State, 348 So.2d 1025 (Miss. 1977). Pursuant to a trial de novo

conducted on October 17-20, 1977,/1 petitioner was again found guilty and again sentenced to death for his transgression.

II. OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported below as Alvin CULBERSON v. STATE of Mississippi, 379 So.2d 499 (Miss. Nov. 28, 1979) reh den Feb. 20, 1980. A copy of that opinion is attached to petitioner's pleading as Appendix A.

III. JURISDICTION

Petitioner seeks to invoke the appellate jurisdiction of this Court by way of a Petition for Writ of Certiorari drawn and presented under the authority granted in 28 U.S.C. § 1257 (3). Respondent does not take issue with petitioner's jurisdictional statement.

IV. QUESTIONS PRESENTED

1. Was petitioner's Fourteenth Amendment right to Due Process and fundamental fairness violated when the evidence on which he was convicted and sentenced to death consisted solely of the testimony of an admitted accomplice who gave state's evidence and received a sentence for manslaughter when by his own admission he was an accomplice to the crime of capital murder?

2. Does the imposition of a sentence of death absent a jury finding that he intended to effect the death of his victim, violate the Eighth and Fourteenth Amendments?

3. Was the jury at petitioner's trial for capital murder, in violation of the Eighth and Fourteenth Amendments, accorded virtually unguided and unrestrained discretion to sentence him to death as a result of Mississippi's broad and vague construction of the aggravating circumstance appearing in § 99-19-101 (5)(h)?

/1 Jackson was decided on October 5, 1976. At the time, however, of petitioner's second trial for capital murder, the Mississippi death penalty statutes in full force and effect were § 97-3-19 (April 23, 1974); § 97-3-21 (April 13, 1977); and § 99-19-101, 99-19-103, and 99-19-105 (April 13, 1977).

4. Was petitioner's Sixth Amendment rights to effective assistance of counsel, compulsory process, and trial by jury denied when the trial court overruled his request for a continuance to obtain witnesses purportedly critical and necessary to his defense to the charge of capital murder?

V. CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concurs with petitioner that this case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States of America.

VI. MISSISSIPPI STATUTES INVOLVED

Petitioner has set forth in his Appendix C the applicable statutory provisions. To his list we would add § 99-19-103 which reads as follows:

> § 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment.
>
> The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

VII. STATEMENT OF THE CASE

Petitioner's capital murder indictment, omitting the formal portions thereof, charged

> "[t]hat ALVERREECE PITTMAN and ALVIN CULBERSON . . . on or about the 31st day of January . . . 1975 . . . did unlawfully, wilfully and feloniously, with malice aforethought, kill and murder one Grady V. Evans, a human being, while engaged in the commission of robbery upon him, in violation of Section 97-3-19, Sub-Section (2)(e), Mississippi Code of 1972, as amended. . ."

(Vol. I:R. 2)

While petitioner was brought to trial, accomplice Pittman, who testified against Culberson, was permitted to plead guilty to manslaughter for which he received a prison term of fifteen years. Pittman served two and one half years of the sentence imposed.

Following the guilt phase of the bifurcated proceedings the jury unanimously returned the following verdict: "We, the jury, find the accused guilty as charged." (Vol. II:R. 253) On the question of guilt, the jury deliberated from 2:27 p.m. until 5:10 p.m. (Vol. II:R. 253)

A separate sentencing proceeding was conducted the following day before the same jury in strict compliance with sections 99-19-101 and 99-19-103, Mississippi Code 1972 (Supp. 1979). At this hearing the state introduced evidence of aggravating circumstances consisting of Culberson's prior record of criminal convictions. The documents introduced reflected guilty pleas to armed robbery and assault and battery with the intent to kill. (Vol. II:R. 256-61,270) A former plea of guilty to the crime of kidnapping was not admitted out of an abundance of precaution by the trial court.

In mitigation the defendant produced his mother who testified that her son, as a child, was both mannerable and obedient; that she took him to church, taught him the Bible, and taught him right from wrong as best she could; that during his childhood he "mostly stayed with [her] parents but was disciplined by her when he needed

it; that they were not wealthy people; that the defendant quit school while in the 11th grade; and that she was the mother of six children. (Vol. II:R. 283-84)

The jury retired from the courtroom to deliberate at 2:19 p.m. and returned a verdict of death at 3:16 p.m. (Vol. II:R. 299) The following pronouncement of death was returned in writing signed by the foreman:

> BY THE FOREMAN: We, the jury, unanimously find from the evidence, beyond a reasonable doubt, that the capital murder in this case was committed while the Defendant was engaged in the commission of the crime of attempted robbery; that the capital offense was especially heinous, atrocious and cruel; that the Defendant has been previously convicted of a felony involving the use of threat or violence to the person. We further find unanimously from the evidence and beyond a reasonable doubt that in weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances, and that the Defendant should suffer the penalty of death. Jury Foreman, Steve Presley.
>
> (Vol. II:R. 300)

A poll was taken of the jury which indicated that all twelve members voted for the verdict of death. (Vol. II:R. 300)

Petitioner did not testify at either phase of his bifurcated trial. His conviction of capital murder, admittedly, rests largely upon the testimony of Culberson's confederate, Alvarese Pittman.

According to the state's evidence petitioner, on January 31, 1975, shot and killed Grady V. Evans, a Frito-Lay route salesman, while Evans was stopped at the Beverly Lounge located on old Highway 49 near Gulfport, Mississippi. (Vol. I:R. 25) State pathologist, Dr. Richardo Lopez, testified that the death of the 49-year-old Evans, white male (Vol. I:R. 78), was caused by "hemorrhagic shock" precipitated by a gunshot wound which perforated several main blood vessels connected to the heart. (Vol. II: R. 75-76)

The state's case consisted of the testimony of co-defendant Alvarese Pittman and other nearby witnesses who heard the gunshot

and observed the two defendants fleeing on foot from the scene. While these witnesses could describe the general appearance and clothing of the perpetrators, none could identify Culberson as one of the two men.

Pittman testified that on Friday, January 31, 1975, he saw petitioner at the Blue Flame Club in North Gulfport between eleven and twelve in the morning. (Vol. II:R. 169) He stated:

> Well, we was sitting there and Alvin came, and we just started about robbing somebody. He was broke and I was broke. We wasn't looking for nobody in particular to rob, we was just walking up towards Old Highway 49, and on our way up toward Old Highway 49 we saw a Frito truck in front of the Beverly Lounge. We was walking that way, and alongside the ditch was a table leg, a stick, and Alvin picked the stick up and we went on up to the Club.
>
> (Vol. II:R. 170)

Pittman explained that they were "[g]oing to knock the man out with the stick" and "[r]ob him. After we knocked him out we was going to get his money." (Vol. II:R. 173) As the two men approached Evans, both Pittman and Culberson spoke to him, and the salesman spoke back. (R. 174) After Evans walked past his two assailants, Culberson ". . . turned around and hit the man in the back of the neck with the stick, which he intended to knock him out. He knocked him down but he didn't knock him out, and the man fell on the ground and begged him, throwed up his hands and hollered for help." (Vol. II:R. 175) At this time, the defendant pulled out a pistol and shot Evans. (Vol. II:R. 175)

The assailants then fled, having taken no money from Evans. (Vol. II:R. 179) Pittman explained that ". . . after the shot was fired the door was wide open in the Club, and I wasn't going to be caught standing over him, trying to get no money from him, so I ran. We ran." (R. 179)

While petitioner did not testify during the guilt-finding or sentence-determining phases of this cause, he took the witness stand during the hearing conducted on his motion for new trial. (Vol. III:R. 304-404) At this time he presented, belatedly, an

alibi defense. (Vol. III:R. 381-86)

On appeal to the Supreme Court of Mississippi all justices concurred that the jury's first phase verdict of guilty should be affirmed. There was some disagreement, however, on the question of the appropriate penalty. A majority of six justices were of the opinion the sentence of death should be affirmed while three justices dissented.

VIII. SYNOPSIS OF RECENT DEATH PENALTY LEGISLATION IN MISSISSIPPI AND SUMMARY OF DECISIONAL AUTHORITY RELEVANT THERETO.

A brief summary of our recent death penalty legislation and the judicial construction that followed closely in its wake is apropos, we think, at this point. Culberson's first trial was held in June, 1975; it was a product of our 1974 post-Furman mandatory death penalty statutes and was conducted pre-Jackson sans bifurcation. SEE: Jackson v. State, 337 So.2d 1242 (Miss. October 5, 1976). That cause, as noted, was reversed on August 10, 1977, and ". . . remanded for trial with bifurcation in accordance with Jackson." Culberson v. State, 348 So.2d 1025, 1026 (Miss. 1977).

Prior to Culberson's second trial the Mississippi Legislature passed legislative guidelines. SEE: § 99-19-101 et seq. (April 13, 1977). Consequently, at the time of petitioner's second trial for capital murder, the Mississippi death penalty statutes in full force and effect were § 97-3-19 (April 23, 1974) [Homicide - murder defined - capital murder]; § 97-3-21 (April 13, 1977) [Homicide - penalty for murder or capital murder]; § 99-19-101 (April 13, 1977) [Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered]; § 99-19-103 (April 13, 1977) [Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment]; and § 99-19-105 (April 13, 1977) [Review by supreme court of imposition of death

penalty]. Several of these statutory provisions are appended to petitioner's pleading as Appendix C.

Section 97-3-19 today, and at the time of Culberson's second trial for capital murder, is a valid remnant of this state's "mandatory" death penalty law enacted on April 23, 1974, by our State Legislature in the wake of Furman v. Georgia [citation omitted]. This statute redefined the offense of so-called "simple" or non-capital murder[2] and created and defined the offense of capital murder, an offense punishable, of course, by death. The remaining statutes recited by petitioner were either amended [§ 97-3-21] or enacted anew [99-19-101, 99-19-103, 99-19-105] pursuant to legislative action taken on April 13, 1977.

The 1974 "mandatory" death penalty scheme is set forth in our 1974 session laws. SEE: Act of April 23, 1974, ch. 576, § 1-10 [1974] Gen. Laws Miss. 863. In Stevenson v. State, 325 So.2d 113 (Miss. December 15, 1975), the Supreme Court of Mississippi held that a mandatory death penalty statute is constitutional, when, as in Stevenson's case, no showing is made that it was discriminatorily applied. Obviously our State Legislature, as well as the Supreme Court, misinterpreted the mandates of Furman. Following the 1976 decision of Gregg v. Georgia [citation omitted], the Court began the formidable task of extricating this state from the constitutional dilemma precipitated by Furman (and Mississippi's misinterpretation thereof), as well as this Court's revelation in Gregg that a bifurcated trial was desirable, if not required, in death penalty cases.

In a case styled Jackson v. State, 337 So.2d 1242 (Miss. October 5, 1976), the Supreme Court of Mississippi held ". . . that Mississippi's death penalty statute is constitutional as construed and implemented by [the Jackson] opinion and that it satisfied the

---

[2] There are no statutory degrees of murder, numerically designated, in this state.

concerns expressed in Furman and the other recent cases." 337 So.2d at p. 1256. Our Court thus revitalized and preserved the constitutional integrity of the "ma datory" laws by authoritatively construing them. Consequently, the Mississippi Supreme Court's response to Gregg and its companion cases was the promulgation, in October, 1976, of the so-called "judicial" version of the bifurcated trial for death penalty cases. Several defendants have since been tried, convicted, and sentenced to death under the Jackson death penalty scheme,/3 but the present petitioner is not one of them.

At the time the Supreme Court of Mississippi was judicially construing our mandatory death penalty laws, the Mississippi Legislature was in the process of drafting its version of the bifurcated trial. Approximately seven (7) months post-Jackson, the Legislature, on April 13, 1977, passed a new bill articulating the "legislative" or statutory version of the bifurcated trial. SEE: Act of April 13, 1977, ch. 458, § 1-13 [1977] Gen. Laws Miss 817.

Section 97-3-19 defining the offenses of murder and its capital counterpart was not changed, altered, narrowed, or diluted in any manner by the 1977 legislation. Section 97-3-21, Mississippi Code of 1972, was amended to require life imprisonment or death as punishment for capital murder cases; sections 99-19-101 and 99-19-103 were enacted to require a separate sentencing procedure and to set forth specific guidelines for the sentencing procedure, and section 99-19-105 was enacted to require a meaningful appellate review by the Mississippi Supreme Court of cases involving the imposition of the death penalty. Our death penalty law consequently existed in this posture at the time of petitioner's second trial for capital murder. Culberson was tried totally under the 1977 legislative bifurcation and is not a product of Jackson.

/3 SEE: Bell v. State, 360 So.2d 1206 (Miss. May 24, 1978); Irving v. State, 361 So.2d 1360 (Miss. August 2, 1978); Jordan v. State, 365 So.2d 1198 (Miss. November 22, 1978).

A number of other defendants sentenced to death pursuant to trials conducted under either judicial or legislative bifurcation have recently petitioned this Court for a writ of certiorari. In order to place petitioner's case in its proper perspective, we feel compelled to identify these ancillary actions and to briefly pinpoint the gist of the constitutional questions presented in them.

Charles S. BELL v. STATE of Mississippi, 360 So.2d 1206 (Miss. May 24, 1978), was a death penalty case [capital murder] tried totally under Jackson bifurcation. Bell, in Cause No. 78-5862, petitioned this Court for certiorari on December 11, 1978. He challenged the constitutionality of Jackson's bifurcated procedures. This Court denied certiorari on March 5, 1979. SEE: 440 U.S. 950.

John Buford IRVING v. STATE of Mississippi, 361 So.2d 1360 (Miss. August 2, 1978), also involved a conviction of capital murder and a subsequent sentence of death. Irving, in the manner provided Bell, was given a bifurcated trial following the guidelines set forth by our appellate judiciary in Jackson v. State. On December 13, 1978, he petitioned this Court for certiorari in Cause No. 78-5873. Irving, like Bell his predecessor, challenged the constitutionality of a court-created capital sentencing procedure. He argued that the imposition of a sentence of death pursuant to the Jackson procedures was not compatible with the Eighth and Fourteenth Amendment to the United States Constitution. Certiorari was denied on April 16, 1979. SEE: 60 L.Ed.2d 386.

Jimmy VOYLES v. STATE of Mississippi, 362 So.2d 1236 (Miss. September 20, 1978), involved a capital case tried in the court below ". . . under the guidelines set out by [the Supreme Court of Mississippi] in Jackson v. State [citation omitted], as codified by legislative enactments set out in Mississippi Code Annotated sections 99-19-101 and 99-19-103 (1977 Supp.)." 362 So.2d at p. 1237. Voyles' trial was a product of both Jackson [1976] and legislative [1977] bifurcation.

Voyles petitioned this Court for certiorari on February 16, 1979, in Cause No. 78-6225. He argued that his sentence of death contravened the permissible scope of the Eighth and Fourteenth Amendments because the Mississippi statute [as well as the jury instructions granted in his case] permitted his condemnation without proof that he intended to kill his victim. Petitioner, we note, launches a similar attack.

Several other constitutional challenges were directed by Voyles toward the capital sentencing procedures enacted in 1977 by our State Legislature. Among them was a claim that § 99-19-101(5)(h) ["The capital offense was especially heinous, atrocious or cruel"] suffered from the constitutional infirmities of vagueness and overbreath, likewise, one of petitioner's present complaints. This Court denied certiorari on May 14, 1979. SEE: 60 L.Ed.2d 1059.

Johnny Lewis WASHINGTON v. STATE of Mississippi, 361 So.2d 61 (Miss. July 12, 1978), was a capital murder case prosecuted solely under legislative bifurcation. On direct appeal to the Mississippi Supreme Court, Washington contended that § 99-19-101 (5)(h) was unconstitutionally vague. Our Court rejected that contention for the reasons succinctly advanced in its written opinion. This matter was not raised, however, in Washington's subsequent petition for a writ of certiorari filed in this Court on or about January 23, 1979, in Cause No. 78-6091. Washington advanced other constitutional claims in its stead. Certiorari was denied on April 16, 1979. SEE: 60 L.Ed.2d 388.

The next death penalty case to reach this Court was Richard Gerald JORDAN v. STATE of Mississippi, 365 So.2d 1198 (Miss. November 22, 1978), a product exclusively of Jackson bifurcation. Jordan's conviction of capital murder was affirmed. On April 24, 1979, he petitioned this Court, in Cause No. 78-6577, for a writ of certiorari, arguing, inter alia, that the Jackson procedure did not adequately channel jury discretion and that it suffered anemically from a number of other constitutional infirmities.

His petition was denied on October 1, 1979. SEE: 62 L.Ed.2d 114.

Finally, we mention Jimmy Lee GRAY v. STATE of Mississippi, 375 So.2d 994 (Miss. September 26, 1979), the most recent death penalty case considered by this Court in the wake of a certiorari petition. Gray, who was tried under statutory bifurcation, filed his petition for certiorari on March 14, 1980, in Cause No. 79-6250. He argued, inter alia, that the Supreme Court of Mississippi has tolerated such a broad and open-ended construction of statutory aggravating factors, (5)(h) included, as to virtually eliminate any meaningful guidance for juries. Gray claimed that Mississippi juries still retain virtually unbridled discretion to interpret the aggravating circumstances in any manner they choose in violation of the Eighth and Fourteenth Amendments. Present petitioner advances similar contentions.

This Court denied Gray's petition on June 2, 1980. A request for rehearing has not been ruled upon to date. SEE: 64 L.Ed.2d 847.

Culberson's quest for the grant of a writ of certiorari follows therefore, in the wake of similar petitions filed in Bell, Irving, Voyles, Washington, Jordan, and Gray. Two of the four questions presented for consideration here have surfaced on previous occasions. Subsequent petitions in death penalty cases later decided will in due course follow.

On December 19, 1979, the Supreme Court of Mississippi, in Stanley Coleman v. State of Mississippi, 378 So.2d 640 (Miss. December 19, 1979), upheld the capital murder conviction of a Forrest County man but reversed and remanded as to the sentencing phase for modification of sentence to imprisonment for life. The Supreme Court vacated the sentence of death, holding in the wake of intensive appellate scrutiny, that Coleman's punishment "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." 378 So.2d at p. 650. Coleman was tried under legislative bifurcation.

The two most recent death penalty cases decided by the Supreme Court of Mississippi are Larry JONES v. STATE of Mississippi, 381 So.2d 983 (Miss. January 16, 1980), and Willie REDDIX v. STATE

of Mississippi, 381 So.2d 999 (Miss. February 13, 1980). They are companion cases. The capital murder convictions and sentences of death imposed upon both Jones and Reddix were affirmed by the Court pursuant to jury trials conducted under legislative guidelines. Each defendant had been tried previously during proceedings conducted sans bifurcation. Our Court reversed and directed new trials following Jackson v. State, 337 So.2d 1242 (Miss. 1976).

Finally, two cases have involved appeals of convictions of capital murder pursuant to bifurcated trials and jury sentences to life imprisonment. Each was affirmed by the Supreme Court of Mississippi. SEE: Nealy v. State, 354 So.2d 788 (Miss. February 1, 1978), and Price v. State, 362 So.2d 204 (Miss. August 23, 1978).

IX. ARGUMENT

I.

WHERE A FINDING OF GUILT OF THE CAPITAL OFFENSE RESTS SOLELY UPON THE TESTIMONY OF A PLEA-BARGAINING ACCOMPLICE WHO HAS GIVEN STATE'S EVIDENCE AND RECEIVED A SENTENCE OF MANSLAUGHTER WHEN BY HIS OWN ADMISSION HE WAS AN ACCOMPLICE TO CAPITAL MURDER, A SUBSEQUENT SENTENCE OF DEATH IMPOSED UPON THE TRIGGERMAN AND PREDICATED UPON A BALANCING OF AGGRAVATING AND MITIGATING FACTORS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner argues that his sentence of death violates the Due Process Clause of the Fourteenth Amendment. He opines that the proof in this cause fails to satisfy the "need for reliability" that purportedly attaches to a death penalty case. Consequently, he says, while a capital conviction may rest upon the testimony of an accomplice, such evidence is constitutionally insufficient to sustain a sentence of death. This contention, we think, presents a dichotomy too onerous to digest. Moreover, the issue involves a matter of state substantive law and fails to raise a substantial federal question.

We fully concur with the Supreme Court of Mississippi which observed in petitioner's case that "[w]hen two or more persons

commit a crime and cannot be identified except by one of the participants, the state must be allowed some discretion in securing the testimony of one of the participants in order to solve the crime.

> To hold otherwise would be tantamount to holding: (1) The testimony of an accomplice in a capital murder case is sufficient to sustain a conviction in the guilty phase of the trial,but is not sufficient to sustain the death penalty in the sentencing phase. (2) If an accomplice who testifies for the state in a death penalty case is not given the death penalty, the trigger man may not be given the death penalty. Such result is not required by our statutes, the decisions of the United States Supreme Court, or our decisions."

379 So.2d at p. 510.

It has long been a rule of substantive law in this State that an accused may be convicted on the uncorroborated testimony of an accomplice. Moody v. State, 371 So.2d 408 (Miss. 1979); Jones v. State, 368 So.2d 1265 (Miss. 1979); Thomas v. State, 340 So.2d 1 (Miss. 1976); Sanders v. State, 313 So.2d 398 (Miss. 1975); Moore v. State, 291 So.2d 187 (Miss. 1974); Feranda v. State, 267 So.2d 305 (Miss. 1972). This is not unlike the federal rule. SEE: United States v. Cravero, 530 F.2d 666, 670 (5 Cir. 1976); United States v. Sabin, 526 F.2d 857, 859 (5 Cir. 1976); United States v. Iacovetti, 466 F.2d 1147, 1153 (5 Cir. 1972); United States v. Vida, 370 F.2d 759, 767 (6 Cir. 1966); United States v. Figurski, 545 F.2d 389, 392 (4 Cir. 1976).

> [I]n federal courts "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." Caminetti v. United States, 1917, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed.442. See also a long line of Fifth Circuit cases, including Patterson v. United States, 1969, 413 F.2d 1001, 1003, and Stewart v. United States, 1969, 412 F.2d 818, 819, n. 1, cited on page 3 of appellee's brief.[3]

United States v. Green, 446 F.2d 1169, 1172 (5 Cir. 1971) [text of n. 3 omitted].

In Mississippi, when a conviction is obtained upon the uncorroborated testimony of an accomplice, "strict rules relating to the testimony must be followed." Vanderpoel v. State, 251 So.2d 922, 926 (Miss. 1971). The "strict rules" alluded to supra, are

summarized in this language quoted from Black v. State, 336 So.2d 1302, 1303 (Miss. 1976):

> The law is settled in this state that the uncorroborated testimony of an accomplice will support a guilty verdict, but the rule requires that such uncorroborated testimony should be viewed with great caution and suspicion, and that it must be reasonable and not improbable or self-contradictory, or substantially impeached. Hutchins v. State, 220 So.2d 276 (Miss.1969); Cole v. State, 217 Miss. 779, 65 So.2d 262 (1953).

336 So.2d at p. 1303.

In many instances, the issue becomes: "Was the testimony of [the accomplice] so uncorroborated as to make it improbable, self-contradictory, not reasonable and substantially impeached?" Vanderpoel v. State, supra, 251 So.2d at p. 926.

In petitioner's case, it is true that the testimony of Pittman, the accomplice, was uncorroborated with respect to Culberson's identity as a participant in the constituent felony and the ensuing homicide. This is because only Pittman and Culberson witnessed the shooting although several bystanders heard the shot and observed two black males leaving the scene. While these witnesses could describe the general appearance and clothing of the fleeing felons none could identify petitioner as one of the two they saw on this occasion.

Nevertheless, Pittman's version of the escapade was corroborated in important particulars by photographs introduced at trial as well as the physical facts, e.g., the use of a stick or table leg to incapacitate the victim by striking him on the back of the head and neck. This stick was introduced into evidence by the state, and the medical testimony established the presence of abrasions on the scalp of the occipital area. In short, Pittman's testimony was not totally uncorroborated.

Assuming arguendo that it was, his testimony was not unreasonable, improbable, self-contradictory, or substantially impeached by unimpeached witnesses. Although it became necessary during the trial for the jury to resolve the truthfulness of an affidavit executed by Pittman while incarcerated in prison [he swore therein that he did not see Culberson shoot anyone], this contradiction was

explained to the jury as being the product of fear because Pittman thought his life was in danger. (Vol. II:R. 195) He repudiated at trial the truthfulness of the prison affidavit and reaffirmed that Culberson was the person who killed Evans. We concur with the Supreme Court of Mississippi that ". . . reasonable explanation of contradictions may be offered, leaving the evidence sufficient for the jury's resolution if it accepts the explanation." 379 So.2d at p. 503. The truth of the matter is that it cannot be said in petitioner's case that Pittman's testimony was unbelievable on its face. SEE: United States v. Cravero, supra.

Turning now to the pivotal inquiry, we respectfully submit that where the testimony of an accomplice passes evidentiary muster under the rigid requirements imposed by state substantive law for the purpose of conviction; where, as here, the defendant receives a basic cautionary instruction (Vol. II:R. 239); and where, as here, the jury is fully aware of the plea-bargaining accomplice's guilty plea to a lesser offense as well as the sentence imposed and the time actually served (Vol. II:R. 197-98), imposition of the penalty of death upon the triggerman in the wake of consideration of aggravating and mitigating circumstances does not deprive the latter of due process and fundamentally fair treatment.

In petitioner's case, the jury was free to consider in a mitigating context the fact that his accomplice was permitted to plead guilty to manslaughter. It was aware that Pittman had received a fifteen-year sentence and that he served only two and one-half years. Pittman, in fact, was cross-examined in great detail with respect to this state of affairs (Vol. II:R. 197-201), and while a great majority of the closing arguments is not a matter of record, there is, nevertheless, every indication that this facet of the case was placed squarely before the sentencer. (Vol. II:R. 248,250-51) Unquestionably, the jury believed and accepted the testimony given by Pittman, as was its prerogative. The present challenge, in our opinion, does not involve a question of federal constitutional law; rather, it raises an issue of credibility governed by state substantive law.

The state court decision rests solidly on this foundation, and this matter is immune from review in the federal courts. Wainwright v. Sykes, 433 U.S. 72 (1977).

In any event, we observe that the Supreme Court of Florida has held that a jury is entitled to consider the sentence imposed upon an accomplice in arriving at its recommendation of sentence to be imposed upon the defendant. Messer v. State, 330 So.2d 137 (Fla. 1976). This, we submit, is the correct approach because we agree that "[d]efendants should not be treated differently upon the same or similar facts." Messer v. State, 330 So.2d at p. 142.

The Supreme Court of Mississippi has never addressed this question because it has not been raised heretofore in a death penalty case. SEE, however: Jones v. State and Reddix v. State, supra, where the jury imposed a sentence of death upon both the direct perpetrator and his accomplice. We observe, however, that our Court, in petitioner's case, decided for the purpose of appellate review that the words "imposed in similar cases, considering both the crime and the defendant" include for review and comparison ". . .not only the capital cases heretofore determined by this Court in which the death sentence has been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given the death penalty and an accomplice less than death." 379 So.2d at p. 510. It is clear to us that where a peripheral accessory negotiates a plea for a reduced sentence, a jury adjudicating the fate of the direct perpetrator should have the benefit of the consequences suffered by the accomplice in arriving at its recommendation of the sentence to be imposed on the triggerman. We presuppose, of course, that at the time of trial the accomplice has been sentenced and the accused has assumed the burden of placing this matter before the sentencing authority.

In United States v. Cravero, supra, the Court of Appeals for the Fifth Circuit observed that

> [o]ne of the oldest established rules of Anglo-American jurisprudence is that the jury is the arbiter of credibility of witnesses.[5] As the Supreme Court stated in Hoffa v. United States, 385 U.S. 293, 311, 87 S.Ct. 405, 418, 17 L.Ed.2d 374, 387 (1966),
>
> > The established safeguards of an Anglo-American legal system leave the veracity

> of a witness to be detected by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.
>
> The trial judge cannot arrogate to himself this power of the jury simply becasue he finds a witness unbelievable. See, United States v. Weinstein, supra, at 713. Under our system of jurisprudence a properly instructed[6] jury of citizens decides whether witnesses are credible. The trial judge is deemed to have no special expertise in determining who speaks the truth. Glasser v. United States, [315 U.S. 60 (1942)]; United States v. Parr, 516 F.2d 458, 464 (5th Cir. 1975); United States v. Davis, 487 F.2d 112, 126 (5th Cir. 1973); Williamson v. United States, 365 F.2d 12 (5th Cir. 1965); Puentes v. United States, 319 F.2d 581 (5th Cir. 1963).
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> 530 F.2d at p. 670[text of n. 5 and 6 omitted].

If the testimony of an accomplice in a capital murder case is legally sufficient to sustain a conviction in the guilt phase of the bifurcated trial, it follows that it is sufficient to justify, in the wake of evidence of any aggravating and mitigating factors, consideration of the death penalty during the sentencing phase. We cannot accept as a matter of constitutional principle petitioner's suggestion that where an accomplice who testifies for the state in a death penalty case is not given the penalty of death, the trigger-man may not be given the death penalty regardless of the quantum and quality of aggravating and mitigating factors.

Our view that the testimony of an accomplice, if sufficient for conviction, is also sufficient for imposition of a sentence of death, is underpinned, we submit, in Edwards v. People, 1 L.Ed.2d 17, 76 S.Ct. 1058 (1956), where petitioner, convicted in a New York state court of first degree murder, sought a stay of the execution of a death sentence imposed upon him. In his application for a stay, petitioner claimed that he was denied "due process" because of a number of episodes occurring at the trial. These episodes involved: "* * *(4) the alleged perjury of the prosecution's principal witness, an admitted accomplice in the crime; (5) the alleged inadequate corroboration of the accomplice's testimony under New York law; and (6) alleged erroneous instructions by the trial Court as to the credibility of the accomplice.

In an opinion in chambers rendered by Mr. Justice Harlan, we find this language:

> In my opinion, neither this nor any of the other testimony of the accomplice borders on the use of perjured testimony which might give rise to a valid claim of denial of due process.[2] The record shows no more than the not unusual discrepancies in the testimony of this kind of witness, whose unsavory character and circumstances in relation to the case were fully dealt with by the trial Judge in his charge to the jury. See fols. 1615-1617, 1687-1692. The credibility of the accomplice was for the jury, and the record discloses nothing on this score which even approaches the level of a tenable claim of denial of due process.
>
> As to (5) and (6): It is sufficient to say that these contentions involve only matters of state law and raise no federal questions. See Lisenba v. California, 314 U.S. 219, 227, 86 L.ed 166, 175, 62 S.Ct. 280.
>
> Realizing the heavy responsibility which rests on a single Justice of this Court where life is at stake, I can only conclude that there is no substance to petitioner's effort to obtain a further review of his conviction by this Court, and that it is my duty to deny this application.
>
> I am constrained to add that Mr. Finerty and Mr. McClane, who only recently came into the case, have done their utmost for petitioner, but nothing has been shown which would justify me in interfering with the stern course of the State's judgment.
>
> 1 L.Ed.2d at p. 22.
> [emphasis ours; text of n. 2 omitted]

And, in United States v. Augenblick, 393 U.S. 348 (1969), this Court opined that "[w]hen we look at the requirements of procedural due process, the use of accomplice testimony is not catalogued with constitutional restrictions." 393 U.S. at p. 352.

In the days of the common law, the courts were afraid to trust the intelligence of the jurors. We think, however, this language from Gregg v. Georgia, supra, sheds some light on the confidence we must place in the average contemporary jury to fairly and accurately assess the credibility of an admitted accomplice who has turned state's evidence:

> "Jury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."' Witherspoon v. Illinois, 391 U.S. [510], at 519 n. 15, 88 S.Ct. [1770], at 1775 n. 15 [20 L.Ed.2d 776 (1968),

quoting Trop v. Dulles, 356 U.S. [86], at 101, 78 S.Ct. [590], at 598 [2 L.Ed.2d 630 (1958)] (plurality opinion)."

428 U.S. at 190,96.

Where, as here, the testimony of the accomplice passes the rigid tests required for conviction under applicable state law; where, as here, the defendant has been allowed great latitude in probing the crediblity of the accomplice; where, as here, the issues have been carefully submitted to the jury with judicious instructions, e.g., a cautionary charge; where, as here, the jury, during the punishment phase,has before it for consideration in a mitigating context the sentence imposed on the accomplice; and where, as here, the Supreme Court of Mississippi has indicated that for the purpose of augmented appellate review from a proportionality perspective it will consider not only the capital cases heretofore determined by that Court in which the death sentence has been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given the death penalty and an accomplice less than this, a sentence of death resting upon the testimony of an admitted and plea-bargaining accomplice does not violate the Due Process Clause of the Fourteenth Amendment.

Finally, we think, the admonition issued by Justice Walker in his specially concurring opinion penned in the wake of petitioner's state court appeal is worthy of special attention. He said:

> We must be careful, lest we impose so many restrictions, impossible of reasonable application, that the death penalty statutes will be, for all practical purposes, nullified. That is a matter for the legislature and not the courts.

379 So.2d at p. 513.

II.

WHERE A LACK OF INTENT IS BEFORE THE SENTENCING AUTHORITY FOR CONSIDERATION IN A MITIGATING POSTURE, A SENTENCE OF DEATH WITHOUT A JURY FINDING THAT PETITIONER INTENDED TO EFFECT THE DEATH OF HIS VICTIM DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

First of all, we cannot agree with petitioner that the state's proof in this case, if it is to be believed, was insufficient to establish that Culberson intended to take the life of his helpless victim. Goodness! Petitioner shot Evans coldbloodedly at close range while his target was lying on the ground begging for help. The bullet from the .22 pistol almost struck Evans in the heart. It has never been contended or even suggested that the fatal wound was inflicted by a wayward projectile or that the homicide was otherwise accidental and unintended.

This case does not fall within that category of atypical death penalty cases prosecuted under a felony-murder theory where the defendant's state of mind even remotely places his criminal culpability in question. Culberson was a direct perpetrator and not a peripheral accessory; he was the triggerman who shot the victim senselessly and without provocation. While the initial intent as testified to by Pittman may have been simply to rob Evans after first incapacitating him, it has long been recognized that malice aforethought or deliberate design, i.e., a design to effect the death of the person killed,/4 need not exist in the mind of the

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/4 "Malice aforethought" is the single most important element of murder. Pendergraft v. State, 213 So.2d 560 (Miss. 1968) (citations on appeal and rehearing omitted). In this state it is equivalent to "premeditated design" [Dye v. State, 127 Miss. 492, 90 So. 180, 181 (1922)], or "deliberate design" to kill or effect death. [Hawthorne v. State, 58 Miss. 778 (1881)]. The Mississippi Supreme Court in more recent years has continued to adhere to this viewpoint. In Emily v. State, 191 So.2d 925, 926 (Miss. 1966), the Court articulated this language:

> The second assignment of error is that the trial court erred in granting to the state an instruction which used the words "deliberate design," rather than the statutory words,

slayer for any definite length of time. Pittman v. State, 297 So.2d 888, 893 (Miss. 1974), n. 1; State Instruction S-5 (Vol. II: R. 231).

Furthermore, "[i]ntent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances." Newburn v. State, 205 So.2d 260, 265 (Miss. 1967). Clearly a jury could infer from the facts of record that petitioner intended to take the life of his victim. Was Culberson armed with a pistol, and did he intend to use it, if necessary? He was and he did.

Regretably, however, we have no way of truly knowing in this case whether or not petitioner's trial jury found that he acted with malice or design to effect death. While the indictment charged malice, and while state instruction S-4 (Vol. II:R. 230) would not have permitted a guilty verdict without a specific finding of

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/4 cont'd

> "premeditated design." "Deliberate" is a synonym for "premeditated." Webster, New International Dictionary (2d ed. 1955). This Court has said that "malice aforethought," "deliberate design," and "premeditated design" mean the same thing. Hawthorne v. State, 58 Miss. 778 (1881).
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> 191 So.2d at p. 926 [emphasis supplied].

"Malice aforethought" or "deliberate design" connote an actual intent to kill. Peterson v. State, 242 So.2d 420, 427 (Miss. 1970). It is essential to the existence of "malice aforethought" that there shall have been a design or intent to effect the death of the person killed. Ellis v. State, 108 Miss. 62, 66 So. 323 (1914). In short, a finding of "malice aforethought", in the absence of a finding of justification or excuse, implies a deliberate design to effect death or, at the very least, an intent to inflict great bodily harm that might reasonably be calculated to result in one's demise.

A similar connotation attaches to the word "wilfully." In Mississippi, as well as a great majority of other jurisdictions, "wilfully" means "intentionally." Ousley v. State, 154 Miss. 451, 122 So. 731 (1929).

In petitioner's case, we note, the indictment charged "malice aforethought", and the verdict returned at the close of the guilt phase was, "We, the jury, find the accused guilty as charged." (Vol. II:R. 253)

malice,/5 we concur with petitioner that state instruction S-6 (Vol. II:R. 232) permitted guilt to be found if he acted ". . . either with the former purpose to effect [the victim's] death or without such intent. . ." Nevertheless, this is not, as petitioner asserts, a case where proof of intent is "absent"; it is a case replete with evidence from which intent could be reasonably and fairly deduced from the facts and circumstances but one where we have no way of knowing specifically which course the trial jury followed. As we will more fully develop on the pages that follow, however, such a state of affairs is not constitutionally fatal to petitioner's sentence of death.

We concur also with petitioner that our present death penalty statutes defining the crime of capital murder and prescribing the permissible punishment therefor, could indeed permit a defendant convicted of capital murder under the so-called "felony-murder" concept to be sentenced to death regardless of whether or not he intended to effect the death of his victim. But the constitutional criticism directed at this state of affairs by the present petitioner, as well as a host of other death penalty candidates, has largely focused upon capital defendants who, a la Sandra Lockett,/6 were peripheral accessories to the homicide. Present petitioner, of course, was the "triggerman" and, consequently, a direct perpetrator.

Notwithstanding, under our statutory scheme for capital cases a finding of guilt in the wake of the first phase of the bifurcated trial is certainly permissible under the felony-murder theory without regard to the nature and character of the defendant's mens rea. We observe, however, that the evidentiary role that one's state of

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/5 State instruction S-5 (Vol. II:R. 231) informed the jury that malice aforethought ". . . does not have to exist in the mind of the defendant for any given length of time, so long as it exists at the time of the alleged act."

/6 Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (July 3, 1978).

mind plays with regard to the sentencing process depends, under our present scheme, upon consideration, as a mitigating factor, of this facet of the case by the sentencing authority.[7] A finding that one committing a homicidal act did not possess a design or purpose to cause the victim's death does not automatically mean that the death penalty will be imposed. That question is decided only after a meticulous and delicate weighing process involving the balancing of mitigating and aggravating factors.

The target of petitioner's present lamentations is the portion of § 97-3-19(2)(e) which reads: "When done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . ." [emphasis supplied]

The Supreme Court of Mississippi has held that this language is not unconstitutionally vague. Gray v. State, 351 So.2d 1342 (Miss. November 16, 1977). In articulating the intent of the Mississippi Legislature the Court stated: "* * *We believe that the intent of the legislature in enacting the statute was to save the lives of victims of crimes. If the perpetrators of the crime of rape, burglary, kidnapping, arson or robbery know there is a possibility they will suffer the death penalty for killing their victims, such knowledge may, and probably will, deter such persons from taking the life of the victim of the crime.* * *" 351 So.2d at p. 1345.

Further views were recently and more fully expressed in petitioner's case where our Court discussed at some length the concept of felony-murder and the posture it assumes in a death penalty case. Speaking for a unanimous court on the guilt-determining phase, Chief Justice Patterson said: "* * *The constituent crime with its hazardous potential is that which the legislature intended to deter by permitting capital punishment if death results from the felonious undertaking. * * *The subjunctive nature of the intention to kill

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[7] In Mississippi the jury is the sentencing authority in a death penalty case.

makes it no less deliberate and no less deserving of capital punishment than if it had been expressed, in our opinion. The felon who causes death in furthering his crime manifests a callous disregard for human life, because he subordinates the life of the innocent to his desire for gain, thereby inviting the outrage of a society understandably bent upon protecting itself from physical violence." 379 So.2d at p. 507.

Following a discussion of the divergent viewpoints expressed in Lockett v. Ohio, the Court concluded that "[o]ur statute places no limit upon the mitigating factors that may be considered in the capital sentencing process, and since it includes the minor role of the defendant as a mitigating factor, we conclude it suffers no constitutional infirmity under Lockett." 379 So.2d at p. 508. Consequently, it is reasonably clear to us that the statute in question serves a legitimate and discernible legislative purpose, albeit a volatile and highly controversial one.

In petitioner's case the jury, at the close of the sentencing phase, was instructed that "'Mitigating Circumstances' may be the following:

1. The age of the Defendant at the time of the crime.

2. Any mitigating circumstances or combination of mitigating circumstances surrounding his life and character.

3. Any mitigating circumstances or combination of mitigating circumstances surrounding the commission of the offense with which he is charged."

(Vol. II:R. 288)[emphasis ours]

In this posture, petitioner's lack of intent, if any indeed, was a viable factor before the jury for consideration in a mitigating context.

We are well aware that the Eighth Amendment requires that "punishment must not be grossly out of proportion to the severity of the crime." Gregg v. Georgia, 428 U.S. at p. 173. While Gregg did not address the proportionality question presented here, this

Court did observe that the suitability of the death penalty for various crimes is a question particularly suited to resolution by state legislatures [428 U.S. at pp. 174-87], and that "a heavy burden rests on those who would attack the judgment of the representatives of the people." 428 U.S. at p. 175.

Mississippi ". . . wishes to supply a substantial incentive to those engaged in robbery to leave their guns at home and to persuade their co-conspirators to do the same in the hope that fewer victims of robberies will be killed." Gregg v. Georgia, 428 U.S. at p. 221, n. 10 (concurring opinion by Mr. Justice White). As the Supreme Court of Mississippi observed in petitioner's case, "[t]he felon who causes death in furthering his crime manifests a callous disregard for human life, because he subordinates the life of the innocent to his desire for gain, thereby inviting the outrage of a society understandably bent upon protecting itself from physical violence." 379 So.2d at p. 507.

Mississippi has a legitimate state interest and a viable concern with respect to the aggressor who willfully imposes such a great danger to his victim. Seven (7) of the ten death penalty cases finally decided to date by the Supreme Court of Mississippi have involved killings while the perpetrator was engaged in the commission of the underlying felony of robbery./8 Leaving lack of intent to kill, if any, as a proper mitigating circumstance in the punishment phase of a capital murder prosecution, is more compatible, in our opinion, with the legislative role in determining the appropriate punishment for crimes.

The specific question raised by this petitioner, as well as other death penalty candidates in Mississippi and a number of other

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/8 SEE: Bell v. State, Washington v. State, Irving v. State, Voyles v. State, Culberson v. State, Jones v. State, Reddix v. State, supra.

jurisdictions, has never been fully addressed by this Court. In Lockett v. Ohio, 438 U.S. 586 (1978), the petitioner, an aider and abettor to an armed robbery in which the victim was unintentionally shot and killed, was convicted under Ohio law as a principal and was sentenced to death. Although Lockett's death sentence was reversed on other grounds, three members of the Court discussed the issue in separate concurring opinions. Mr. Justice White expressed the view that the Eighth Amendment was violated by imposition of the death penalty "without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at p. 624. Mr. Justice Blackmun expressed a contrary opinion.

> I do not find entirely convincing the disproportionality rule embraced by my Brother White. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robber participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," post, at 628, 57 L.Ed.2d, at 1004, transforms the culpability of those defendants' actions?
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> Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if

> necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?
>
> The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

438 U.S. at p. 614, n. 2 (separate concurrence of Justice Blackmun).

Mr. Justice Rehnquist reached a similar conclusion in more direct terms.

> I finally reject the proposition argued by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 57 L.Ed.2d, at 1002. Centuries of common-law doctrine establishing the felony-murder doctrine,

> dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

438 U.S. at pp. 635-36 (separate concurrence of Justice Rehnquist).

It goes without saying that the views of the individual members of this Court are conflicting on this question. Nevertheless, those views were expressed in a Lockett environment where the proof showed that the victim grabbed the gun when one Parker, the direct perpetrator, announced the "stickup." The gun went off with Parker's finger on the trigger, firing a fatal shot into the victim. Sandra Lockett was outside the pawn shop at the wheel of the getaway car.

Whether a Mississippi jury, pursuant to sentencing instructions akin to those granted in Culberson's case, would have imposed a penalty of death for her transgression cannot be decided. Such would depend, of course, upon the quantum and nature of the aggravating and mitigating factors. Under our statutes her degree of participation, i.e., her role as an accomplice in the capital offense committed directly by another person, could be considered in mitigation. SEE: § 99-19-101(6)(d).

Assuming arguendo that a Mississippi jury did sentence a defendant in Lockett's posture to death, would not the statutory requirement for intensive appellate scrutiny, particularly the requirement that the court determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" [§ 99-19-105], inure to her benefit and safeguard her right to be sentenced to a punishment that is not grossly out of proportion to the severity of the crime? The final disposition by our state appellate court would hinge upon, inter alia, an assessment of the mitigating and aggravating factors, both from a quantitative and qualitative perspective.

What if Lockett, ala Charles Bell [Bell v. State, supra], had been found to have a long line of convictions involving crimes of violence, e.g., "two convictions of robbery with a deadly weapon, burglary in the second degree, assault with intent to kill, and a prior conviction of capital murder for which [she had] received life imprisonment?" 360 So.2d at p. 1213. What if Sandra Lockett had been found, ala Jimmy Lee Gray [Gray v. State, supra] to have a prior conviction for the murder of a 16-year-old girl? Adoption of petitioner's viewpoint would totally preclude a sentence of death notwithstanding any decisive imbalance of aggravating and mitigating factors. Cannot a sovereign draw the line and say, "enough is enough?" How long must a State wait to put an end to a felon's atrocities, if not for the purpose of deterring others, at least for the purpose of fully and finally deterring him? Death under these circumstances is a product of reason, not caprice.

Petitioner argues that "[t]he unmistakable teaching of [Lockett and the other cases cited at p. 14 of his petition] is that capital sentencing must depend upon the offender's individual culpability..." Petitioner, in our opinion, has grossly overspoken; this claim is not the result of a fair and accurate analysis of those decisions. As observed by the Supreme Court of Mississippi in petitioner's case, ". . .the United States Supreme Court has not held a statute unconstitutional simply because it permits the death penalty to be imposed without affirmative proof of a specific intent to kill." 379 So.2d at p. 507.

Such a requirement, in our view, would be grossly unfair to ". . .a society understandably bent upon protecting itself from physical violence." To mandate that Mississippi may not impose the penalty of death unless its prosecutors prove affirmatively that a particular defendant intended to kill, ignores the very purpose of the mitigating and aggravating features contained in our capital sentencing scheme. For regardless of an absence of

viable mitigating factors and irrespective of the quantitative and qualitative nature of the aggravating factors found in a particular case, that defendant cannot be a candidate for the penalty of death. By virtue of petitioner's approach, the best the State can do for society is to put the defendant away for life, or more realistically for a term of years, where he will, at the expense of the honest and law abiding citizen, eat three square meals a day, sleep in a bed, read magazines, watch television, and assail his conviction collaterally through the state and federal courts. Admittedly, it is not a good life but, then again, neither is it a bad one considering both the crime and the defendant.

In our view, the concurring opinions of Mr. Justices Rehnquist and Blackmun in Lockett, seem to be more convincing and more compatible with the legislative role in determining appropriate punishment for crimes, leaving lack of intent to kill as a proper mitigating circumstance in the punishment phase of a capital murder prosecution. See: Lockett v. Ohio, supra, 438 U.S. at p. 608 (plurality opinion).

Finally, petitioner laments in note 7 that ". . .the prosecution's proof of an unintentional robbery-murder not only satisfies the requirements for a capital murder conviction under Mississippi law, but also automatically establishes an aggravating circumstance. This language, we think, is used rather loosely. Surely petitioner does not suggest that the robbery in this case was unintended. Regardless, it is our view that his claim fails to rise to constitutional dimensions and is not sufficient to raise a serious risk that the death penalty will be imposed arbitrarily, capriciously, or disproportionately.

This argument has been made by several death penalty defendants from this jurisdiction. SEE: Jordan v. State, 365 So.2d 1198 (Miss. 1978), where a similar contention was advanced in the wake of a challenge to Jackson bifurcation and Coleman v. State, 378 So.2d 640 (Miss. 1979), where like criticism was directed to our statutory

procedures.

The basic failing of petitioner's thesis is that this state of affairs does not precipitate "automatic death" under the Mississippi statutes once the State has proved statutory aggravating circumstances.

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.
>
> Gregg v. Georgia, supra, 428 U.S. at p. 199. [emphasis supplied]

Even more persuasive perhaps is the following language penned in Gregg:

> Having found an aggravating circumstance, however, the jury is not required to impose the death penalty. Instead, it is merely authorized to impose it after considering evidence of "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the [enumerated] statutory aggravating circumstances. . ." §27-2534.1(b) (Supp. 1975). Unless the jury unanimously determines that the death penalty should be imposed, the defendant will be sentenced to life imprisonment. In the event that the jury does impose the death penalty, it must designate in writing the aggravating circumstance which it found to exist beyond a reasonable doubt.
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> 428 U.S. at p. 211.

But petitioner adds that a ". . . commission of an unintentional killing during a robbery would both expose him to the death penalty for capital murder and establish the only necessary aggravating circumstance for death sentencing purposes, thus leaving him subject to a 'disproportionately higher (exposure to the death penalty) than. . .a defendant convicted of a premeditated killing." (Petitioner's brief at p. 15, n. 7) First of all, the jury in petitioner's case did not rely exclusively on our (5)(d) aggravating factor. It also found the existence of (5)(b) and (5)(h). In the

second place, it cannot be said that a deliberate and premeditated killing is more deserving of capital punishment than an unintended killing committed in a felony-murder context. "The subjunctive nature of the intention to kill makes [the latter] no less deliberate and no less deserving of capital punishment than if it had been expressed, in our opinion." Culberson v. State, 379 So.2d at p. 507. Consequently, there is no "anomaly" as petitioner suggests, and the argument advanced is without constitutional merit.

III.

SECTION 99-19-101(5)(h), AS INTERPRETED BY THE SUPREME COURT OF MISSISSIPPI AND APPLIED IN PETITIONER'S CASE BY BOTH THE JURY AND OUR APPELLATE JUDICIARY, IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Petitioner suggests that absent some limiting judicial definition, the words of § 99-19-101(5)(h) are so vague and overbroad on their face that men of common intelligence must necessarily guess at their meaning. (Petitioner's brief at pp. 15-16) Consequently, he contends this section violates the Due Process Clause of the Fourteenth Amendment.

Moreover, petitioner opines in an Eighth Amendment context, that Mississippi juries still retain virtually unbridled discretion to interpret the "especially heinous" factor in any manner they choose, thereby creating a substantial risk that the death penalty will be arbitrarily and capriciously inflicted. Specifically, Culberson contends that a finding of death in his case was the result of the unbridled and uncontrolled discretion of a basically uninstructed jury. We respectfully disagree and submit that the holding in Spinkellink v. Wainwright, 578 F.2d 582 (5 Cir. 1978), is correct and forecloses both the Eighth and Fourteenth Amendment inquiries.

First, some preliminary matters are tendered for appellate consideration. Furman v. Georgia, 408 U.S. 238 (1972), was not, in our opinion, intended to be a palatable panacea penned persuasively for the purpose of eliminating "all" jury discretion inherent

in the trial of death penalty cases. This fact was made evident in Gregg v. Georgia, 428 U.S. 153 (1976), where the Court, in upholding Georgia's statutory scheme for the trial of death penalty cases, found that ". . .while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application.'" 428 U.S. at pp. 197-98.

Mississippi's capital sentencing law, § 99-19-101 et seq., (Petitioner's Appendix A) lists eight statutory aggravating circumstances. Subsection (5)(h), which reads, "[t]he capital offense was especially heinous, atrocious or cruel" is, of course, the target of petitioner's present criticism.

When supported by the evidence adduced at either the guilt-finding or sentence-determining phases of a bifurcated trial conducted in Mississippi, any one or more of the eight aggravating circumstances may be submitted via written instruction to the sentencing jury for its consideration of such matters as possible aggravating factors. Before a sentencing jury may even consider imposing a sentence of death, it must find the existence of at least one of the statutory aggravating circumstances enumerated in § 99-19-101. SEE: § 99-19-103 (Supp. 1979).

Moreover, the sentencing jury is required to "unanimously" find the existence of a statutory aggravating circumstance, and it must so find "beyond a reasonable doubt" and not by a mere preponderance of the evidence or by clear and convincing evidence or some less onerous standard of proof. In addition, if its verdict be a unanimous recommendation of death, the jury must list or designate in writing each one of the statutory aggravating circumstances that it "unanimously found beyond a reasonable doubt." SEE: § 99-19-103 (Supp. 1979).

Mississippi's aggravating factors are nearly identical to the aggravating circumstances found in the Florida statute. SEE: Proffitt v. Florida, 428 U.S. 242, 248 (1976); Fla.Stat.Ann. §921.141 (Supp. 1979). That aggravating circumstance (5)(h) has constituted a

"clear and objective" standard is manifested, we think, in the death penalty cases fully decided in Mississippi to date. In our opinion there has been no arbitrary application of this factor to any particular death penalty defendant and most certainly not to petitioner himself, considering both the crime and the defendant.

Factor (5)(h) has been relied upon to date as a partial basis for infliction of the death penalty in six (6) cases tried under statutory bifurcation.[9] In addition, it was cited as a viable aggravating factor for the purpose of appellate review in one case tried under Jackson or judicial bifurcation.[10] While (5)(h) was not submitted to the sentencing jury in that particular case, the reviewing Court noted ". . .that the execution type murder itself was especially heinous, atrocious and cruel, involving mental torture of the victim." 360 So.2d at p. 1213.

Respondents are aware that this provision must be considered as it has been construed by the Supreme Court of Mississippi. Proffitt v. Florida, 428 U.S. at p. 255; Gregg v. Georgia, 428 U.S. at pp. 201-02. We concur that our Court, unlike the Supreme Court of Florida, has expressly declined to construe directly the statutory language criticized. In Washington v. State, supra, the claim of vagueness and overbreath was before the Mississippi Court. Responding thereto, it penned this language: "* * *In our opinion the words 'especially heinous, atrocious or cruel' are not confusing nor likely to be misunderstood by the average citizen. The average citizen has

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[9] They are identified as follows: Washington v. State, 361 So.2d 61 (Miss. July 12, 1978), cert.denied 60 L.Ed.2d 388 (April 16, 1979); Voyles v. State, 362 So.2d 1236 (Miss. September 29, 1978), cert. denied 60 L.Ed.2d 1059 (May 14, 1979); Gray v. State, 375 So.2d 994 (Miss. September 26, 1979), cert.denied ___ L.Ed.2d ___ (June 2, 1980); Culberson v. State, 379 So.2d 499 (Miss. November 28, 1979); Jones v. State, 381 So.2d 983 (Miss. January 30, 1980); and Reddix v. State, 381 So.2d 999 (Miss. February 13, 1980).

[10] SEE: Bell v. State, 360 So.2d 1206 (Miss. May 24, 1978), cert.denied 440 U.S. 950 (March 5, 1979).

a reasonable knowledge of the generally accepted meaning of these words. . .which of necessity must be general when placed in statutes . . ."361 So.2d at pp. 65-66 [emphasis supplied].

While the Court declined to further define directly by judicial construction the words "heinous, atrocious or cruel", it gave to them their "generally accepted meaning" and left to the jury the task of applying these words to the various and sundry factual situations involved in death penalty cases.

The Court fully concurred with Washington's sentencing jury which found that his offense was "especially heinous, atrocious, and cruel." It observed that "[i]t was an especially wanton, willful, useless and cruel killing." 361 So.2d at p. 67 [emphasis supplied].

Additional guidance and judicial insight into the question have been provided by our Court in subsequent cases where the sentence of death was based, in part, on aggravating circumstance (5)(h).[11] In Gray v. State, 375 So.2d 994, 1004 (Miss. September 26, 1979), the Court characterized Gray's offense via this language: "The crime was brutish and cruel, committed upon a helpless and trusting child, for a sordid motive. It was the second human life appellant had taken." [emphasis supplied] In addition, the Court concluded ". . .that the circumstances in evidence amply support a finding that the killing of the three year old child by Gray was 'especially heinous, atrocious and cruel.' It was a brutal killing for a sordid purpose of a helpless child." 375 So.2d at p. 1005 [emphasis supplied]

In petitioner's case [379 So.2d 499, 510 (Miss. November 28, 1979)], the Court held that the penalty of death ". . .is a proper sentence for the senseless and unprovoked murder committed by

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[11] Mississippi has no case finally decided where the aggravating circumstance assailed here nakedly supported a jury finding that the death penalty should be imposed. In all six (6) of the cases reviewed to date, the jury has found the existence of one or more statutory aggravating factors in addition to its finding and reliance upon 99-19-101(5)(h). In Godfrey v. Georgia, of course, the Georgia jury relied exclusively upon the §(b)(7) aggravating factor as a basis for imposing its sentence of death.

Culberson, who, after first knocking the victim down with a table leg, then shot the victim while he was lying on the ground begging, "Help me, help me." [emphasis supplied]

In Jones v. State, 381 So.2d 983 (Miss. January 30, 1980), the Court found that aggravating circumstance (5)(h) ". . .was proved by pictures illustrating the atrociousness of the killing, together with testimony showing the victim to have been old and weak in comparison with appellant." 381 So.2d at p. 995. In the companion case of Reddix v. State, 381 So.2d 999 (Miss. February 13, 1980), our Court opined that the participation of Reddix in "[h]olding the victim's attention from Jones was as much a part of Jones' bludgeoning the victim as if appellant has physically restrained him while his head was being crushed." 381 So.2d at p. 1012. Separate sentencing juries deliberating at different times, we note, found identical facts within the purview of § 99-19-101(5)(h).

In Coleman v. State, 378 So.2d 640, 648 (Miss. December 19, 1979), the Court reaffirmed the position taken in Washington that the statutory language suffered not from vagueness and overbreath. "We rejected this argument in Washington, and again reject it here." Interestingly enough the Coleman jury did not find the existence of this statutory aggravating factor even though it was submitted to the sentencing authority for consideration. SEE: Respondent's Appendix A. This observation would seemingly underpin our present position that there is not one whit of reason to believe that § 99-19-101(5)(h) will not be understood by Mississippi juries and applied in a consistent and evenhanded manner.

The Supreme Court of Mississippi reversed the sentencing phase conducted in Coleman because it found the sentence of death disproportionate to the penalty imposed in similar cases. Tucked neatly away in a segment of the written opinion addressing the question of proportionality and concealed perhaps from the ocular faculties of all but those fortunate souls with a visual acuity of 20/10, is language touching, once again, upon the scope of the

aggravating factor assailed here. We quote:

> In Irving, Washington and Bell, the killings were totally senseless and committed upon hapless victims unarmed and unable to protect themselves. The circumstances in this case are strikingly different. Here, Harry Burkett, the victim, upon seeing the foot of Sims protruding from under the pickup truck, began firing his pistol. Only after being fired upon did the 16-year-old Coleman shoot. Again, Coleman had the opportunity to shoot Mrs. Burkett, who was an eyewitness, but did not. He fled the scene instead.

378 So.2d at p. 650 [emphasis supplied].

We are not, therefore, in complete accord with petitioner's suggestion that the Supreme Court of Mississippi has never ". . . provided any real guidance as to the meaning of" the statutory language "especially heinous, atrocious or cruel." Petitioner's pleading at p. 17. It has on several occasions done so, albeit indirectly. As indicated in our cases, the Court has characterized such killings as "wanton, willfull, useless and cruel",/12 "brutish" and "brutal",/13 "senseless",/14 and "unprovoked."/15

The circumstances of each one of the six (6) cases decided to date involving jury reliance upon § 99-19-101(5)(h) can be accurately characterized as "especially heinous, atrocious or cruel." Such a characterization is wholly consistent with its "generally accepted meaning" and the judicial construction our Court has indirectly given it.

Washington v. State depicts the shotgun slaying of a convenience store owner at a time when the accused had physical possession of the money he intended to steal and could have easily left the premises without inflicting harm to anyone. The victim was not

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/12 SEE: Washington v. State, 361 So.2d at p. 67.

/13 SEE: Gray v. State, 375 So.2d at p. 1004.

/14 SEE: Culberson v. State, 379 So.2d at p. 510; Coleman v. State, 378 So.2d at p. 650 and cases cited therein.

/15 SEE: Culberson v. State, 379 So.2d at p. 510.

killed instantly but was placed in a chair, fully conscious, where a witness attempted to hold the wounded man's digestive organs (or the remnants of them) in place with his hand and a towel. Voyles v. State reflects a brutal killing of a middle-age woman who was beaten into submission prior to being twice run over by defendant's automobile, and Gray v. State depicts the abduction and killing of a helpless child for a sordid purpose. In petitioner's case, the victim had been knocked to the ground by a blow to the head and was begging for help when the accused shot him in the chest, and in Jones v. State and Reddix v. State the deceased was weak and elderly and unable to defend himself against a robber wielding a Stilson wrench which was subsequently used to crush the victim's skull. Finally, in Bell v. State the Supreme Court of Mississippi observed that the execution type slaying of a young teenager was "especially heinous, atrocious, and cruel" because it involved, inter alia, "mental torture" of the victim. 360 So.2d at p. 1213.

In the only capital case where our Court has vacated the sentence of death, the victim was armed and fired the first shots. SEE: Coleman v. State, supra. Neither the sentencing jury nor the reviewing Court found the offense "heinous, atrocious or cruel", indicative, we think, of an evenhanded application of § 99-19-101(5)(h).

The two remaining death penalty cases finally decided to date[16] were tried totally pre-statute under Jackson bifurcation. Consequently, the "especially heinous" factor was not submitted to the sentencing authority in an aggravating context.

We can glean from these prior decisions several consistent conclusions respecting the scope and reach of factor (5)(h).

/16 Irving v. State, 361 So.2d 1360 (Miss. August 2, 1978), cert.denied 60 L.Ed.2d 386 (April 16, 1979); Jordan v. State, 365 So.2d 1198 (Miss. November 22, 1978), cert.denied 62 L.Ed.2d 114 (October 1, 1979).

[1] The words included therein are ordinary words in common use among ordinary people who come in contact with the language frequently, if not in personal conversation, at least through the media;/17 [2] a jury of one's peers thus understands the "generally accepted meaning" of these words. It does not have to guess at what was intended, consequently further definition is not necessary; [3] in reviewing a jury's application of this factor to a particular set of evidentiary circumstances, the Court will look both to the posture of the victim/18 and the motive of the convicted killer for eradicating his prey,/19 as well as the means one used to inflict the mortal wound/20. [4] In this context an "especially heinous, atrocious or cruel" killing has been accurately characterized as useless and senseless, unprovoked, brutish, brutal, and wanton. Petitioner's offense, we think, passes this test with flying colors.

The Supreme Court of Mississippi has decided that the best approach is to let the jury, as it is fully capable of doing, apply these words to the various factual environments without further definition of them. Upon automatic appellate review, the Court will then carry out its statutory responsibility of independently assessing the evidence of record and keeping (5)(h) within constitutional bounds. It will determine if the jury's interpretation, finding, and

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/17 E.g., "Super-cali-fragil-istic-expi-ali-docious
Even though the sound of it
Is something quite atrocious"

[From the 1964 Walt Disney production, "Mary Poppins", music and lyrics by Richard M. and Robert B. Sherman. This popular movie has appeared at our local cinema on several occasions. The lyrics, supra, have been sung from Connecticut to California by children, adolescents, and adults alike.

/18 E.g., helplessness [Gray, Culberson, Jones, and Reddix]; an awareness of impending doom [Bell and Culberson]; the degree of provocation [Culberson and Coleman], and whether the victim died instantly or at a later time [Washington].

/19 E.g., a "sordid" purpose [Gray]; no purpose [Washington and Culberson]; provocation by victim [Coleman].

/20 E.g., an automobile used intentionally as an implement of bodily destruction [Voyles]; a load of buckshot fired at close range inflicting a massive wound from which there was no chance of recovery [Washington].

application of (5)(h) was a product of passion, whim, caprice, or sheer speculation and if it is being applied in a fair and even-handed manner.

This, we think, is a reasonable and constitutional approach because some imprecision is inherent in any use of the English language. There is no reason to believe that the judiciary, or anyone else, is more capable than the average juror of defining and understanding the meaning of the words in question. There is no reason to believe that other words of similar import articulated by a court for the purpose of furnishing additional guidance to the sentencing authority would be any more enlightening to a juror than the words utilized in subsection (5)(h). Any attempt to further define them for the jury's benefit could needlessly precipitate the proverbial "sematic quagmire." Such is not a viable medication for a preexisting malady, if any. Why should ordinary words be defined by other ordinary words which themselves would require yet further definition? Why prescribe a cranial lobotomy for a tension headache when a couple of aspirin will do?

In Proffitt v. Florida, petitioner argued, inter alia, that the aggravating circumstance identical in every respect to the one assailed at bar, save for the use of the word "felony" appearing in the Florida statute in lieu of the word "offense", was constitutionally deficient for vagueness and overbreath. A very similar argument was advanced and rejected in Gregg v. Georgia, 428 U.S. at pp. 201-03.

Just as this Court in Gregg and Proffitt saw no reason to believe that juries would be unable to understand the statutory aggravating circumstances challenged there, there is no reason to believe that § 99-19-101(5)(h) will not be comprehended and fully understood by Mississippi juries and applied in a fair, consistent, and even-handed manner. There is no indication to date that the Supreme Court of Mississippi has adopted such an open-ended construction of this provision as to reduce it to anything less than its "generally accepted meaning" and the construction, albeit

indirect, that the Court has given it. It does not appear that the Mississippi Court has abandoned the characterization made in Washington and applied in subsequent capital cases. To the contrary, it has given additional guidance patently consistent with that construction.

As we indicated on p. 33 of this response, it is our opinion that the reasoning in Spinkellink v. Wainwright, supra, controls the posture of petitioner's case, both as to the Eighth and Fourteenth Amendment inquiries. This Court is well aware of the facts in that case, and we need not plow that ground again. It is enough to say that defendant murdered his traveling companion, Joseph Szymankiewicz, in a Florida motel room. Szymankiewicz, a career criminal, was asleep in bed when the defendant shot him once in the head and a second time in the back. The defendant then recounted a cover story to the motel proprietor in order to delay discovery of the body and left. In the wake of Spinkellink's state court appeal [SEE: Spinkellink v. State, 313 So.2d 666 (Fla. 1975)], the Supreme Court of Florida stated that ". . .the record shows this crime to be premeditated, especially cruel, atrocious, and heinous and in connection with robbery of the victim to secure return of money claimed by Appellant." 313 So.2d at p. 671.

While Spinkellink later argued before the Court of Appeals for the Fifth Circuit that his murder was not "especially heinous, atrocious or cruel", the claim was rejected. The Court, in note 25, said that "[t]he first and certainly foremost impression one receives after considering these [Florida] cases in light of Spinkellink's case is that all of the murders involved, including the murder of Joseph J. Szymankiewicz, were senseless and atrocious.* * *" 578 F.2d at p. 603 [emphasis supplied].

The Court succinctly rejected Spinkellink's Eight Amendment claims of arbitrariness and caprice as well as the claims of excessiveness and disproportionality. 578 F.2d at pp. 599-606. It found "[i]f a state has. . .a properly drawn statute. . . which

the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed." 578 F.2d at p. 605.

It has been argued by a number of death penalty defendants whose sentences were based in part upon jury reliance on the (5)(h) factor that this Court, in both Gregg and Proffitt, left open the question of whether or not the "especially heinous" factor was unconstitutionally vague and overbroad when measured against due process standards. In concluding an enlightening discussion of the Fourteenth Amendment fundamental fairness claim, the Court of Appeals said: "We agree on Fourteenth Amendment due process grounds with the United States Supreme Court in Proffitt that Section 921.141 (5)(h), as construed by the Florida Supreme Court, provides adequate guidance to those charged with the duty of recommending or imposing sentence in capital cases. . . . The contentions that Section 921.141 (5)(h) are vague and overbroad are therefore without merit." 578 F.2d at pp. 611-12 [emphasis supplied; note 35 omitted]

We turn now to an answer to these inquiries. Was subsection (5)(h) construed too broadly and applied arbitrarily and capriciously in petitioner's case by the Mississippi jury? Did our Supreme Court countenance such a broad and vague construction of (5)(h) as to violate petitioner's constitutional rights?

Evidence adduced by the State of Mississippi during the guilt and sentence determining phases having a reasonable bearing on the character of petitioner's killing, is summarized as follows: [1] Prior to firing the fatal shot from a small caliber handgun, Culberson hit Evans in the back of the head with a stick or table leg. (Vol. II:R. 175) The stick broke upon impact (Vol. II;R. 172); nevertheless, the force of the blow was sufficient to knock the victim to the ground. [2] The intent, formed beforehand, was to rob somebody. (Vol. II:R. 170) After Culberson picked up the stick believed to be needed for that purpose and once the target was selected, the intent was further defined, viz., "After we knocked him out [with the stick]

we was going to get [Evans'] money." (Vol. II:R. 173) [3] Culberson ". . .knocked [Evans] down but he didn't knock him out, and the man fell on the ground and begged him, throwed up his hands and hollered for help." (Vol. II:R. 172) [4] The victim's words were, "help, help me!" [5] Culberson thereupon drew his pistol, shot Evans (Vol. II:R. 175), and the perpetrators fled. [6] Evans, although mortally wounded, did not die instantaneously. He struggled to his feet and attempted to enter the front door of the lounge. At the doorway he encountered proprietor Stirling and pleaded again, "help me!" (Vol. II:R. 28,40) [7] Evans began "spitting up blood", and another bystander laid him down on the ground. (Vol. II:R. 28) [8] It seemed to witness Stirling that ". . .it was about forty-five or fifty minutes before anybody come to help." (Vol. II:R. 28)

"Any rational factfinder" could have found these facts within the meaning and purview of § (5)(h). It was applied here in a manner wholly consistent with the construction our court has given it. The shooting was both senseless and without provocation unless, of course, it can be said that the victim's obvious awareness of impending danger and his cry for help transformed this killing into one with a purpose. A rational factfinder could clearly find, however, that such did not.

We are not unmindful of Godfrey v. Georgia, ___U.S.___, 48 U.S.L.W. 4541 (May 19, 1980), but we hardly think this recent decision adds new dimension to petitioner's Due Process and Eighth Amendment claims. Aside from the fact the statutory provision criticized there is qualitatively different from the one under scrutiny here, Godfrey's sentence of death rested exclusively on Georgia's § (b)(7) factor. In note 15, the Court said: "[W]e intimate no view as to whether or not the petitioner might constitutionally have received the same sentences on some other basis."

Culberson's case, of course, presents a horse of a completely different color. Here the "especially heinous" factor was one of three aggravating factors serving as a basis for the penalty imposed.

In addition, the Godfrey Court noted that Godfrey's victims were killed instantaneously./21 Moreover, they were members of his family who were causing him extreme emotional trauma./22 Although Godfrey acknowledged his responsibility and the "hideous" nature of his crimes, Culberson, at his motion for new trial, denied the killing altogether. While this Court mentioned these facts for the purpose of negating the contention that Godfrey's killing involved "depravity of mind" such, nevertheless, constitutes a distinction that must be reckoned with in assessing the scope and reach of factor (5)(h) in Mississippi.

It was apparent in Godfrey that the Georgia Supreme Court, in affirming a sentence of death ". . .based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman'" [48 U.S.L.W. at p. 4544], adopted in Godfrey's case ". . .such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments . . ." We submit, on the other hand, the Supreme Court of Mississippi did not do so in petitioner's case.

A review of our death penalty decisions indicates that our capital sentencing scheme, including the application of subsection (5)(h), provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at p. 313. Coleman v. State, supra, vividly illustrates the fair and evenhanded application of the (5)(h) factor by a Mississippi jury. Coleman, a black male, shot

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/21 In note 16, the Court observed that "[i]n light of this fact, it is constitutionally irrelevant that [Godfrey] used a shotgun instead of a rifle as the murder weapon. . ." In Culberson's case, a small handgun was used to inflict the mortal wound. Still, it caused bodily trauma which fell short of killing Evans instantly. (Vol. I: R. 28,40)

/22 In this posture, Godfrey's killings were not altogether senseless and without provocation. Petitioner's killing, on the other hand, appears to have been perpetrated for little, if any, reason at all. Perhaps it was simply a product of his violent disposition. Or perhaps Culberson perforated his target to silence the outcries of his helpless victim. Such, however, does not — indeed, it cannot —— detract from the character of petitioner's senseless and cold-blooded shooting that resulted in Evans' demise.

and killed a white homeowner after the latter drove up and surprised the defendant who was burglarizing the premises. The victim was not "helpless"; he was armed with a pistol and proceeded to investigate. Coleman's subsequent killing was not without some "provocation" by the victim who first began firing his pistol. The jury declined to find this killing "especially heinous, atrocious, or cruel." Moreover, the Supreme Court of Mississippi reversed the sentence of death, finding it ". . .excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." 378 So.2d at p. 650.

We respectfully submit that provision (5)(h), as construed to date by our appellate judiciary, is not so imperfect as to raise a serious risk that our capital-sentencing system will result in the arbitrary and capricious imposition of the death penalty. In our opinion such has not occurred, and there is no compelling reason to think that it will. Nor does the provision, as construed and applied in petitioner's case, violate his Fourteenth Amendment Due Process right to "fundamental fairness." Further judicial explication by our State Court will in due course follow, but for the present time we feel that more intimate appellate scrutiny of the question presented must await a new horizon.

IV.

PETITIONER'S SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, COMPULSORY PROCESS, AND TRIAL BY JURY WERE NOT DENIED WHEN THE TRIAL COURT OVERRULED HIS REQUEST FOR A CONTINUANCE.

This contention wholly fails to generate sympathetic consideration. It appears the state court rested its decision on state procedural grounds. 379 So.2d at p. 505. Where a state's insistence on compliance with its procedural rules serves a legitimate state interest [Henry v. Mississippi, 479 U.S. 443, 447 (1965)], a criminal decision resting on an adequate foundation of state law is immune from review in the federal courts. Wainwright v. Sykes, 433 U.S. 72 (1977).

Respondent declines to lay fully a factual predicate but does feel compelled to briefly summarize the facts of record.

On the day of trial, October 17, 1977, appellant filed a written request for a continuance on the ground "[t]hat two witnesses for the defense, Darryl Robinson and Leon C. Mills, are not present at this time, though subpoenas have been issued, and that their testimony is necessary to the Defendant in order that he may present a proper defense to the charges now against him." (Vol. I:R. 14) No pretrial ruling on this motion appears in the record of this cause. After the trial was recessed at the conclusion of the first day of testimony, the defendant moved, ore tenus, for a continuance ". . .on the account of the absence of two witnesses", Leon Mills and Darryl Robinson. (Vol. I:R. 69) Both had been subpoenaed, but the returns were marked "not found." The motion was overruled ". . .with the request that the sheriff continue his efforts to find these witnesses, and have the subpoenaes served on them." (Vol. I:R. 72)

The following morning, October 18th, the motion was renewed, again ore tenus, and it, likewise, was overruled with the instruction that "[t]he Sheriff will continue his efforts to find the witnesses named by the defendant." (Vol. I:R. 73) At 1:30 p.m. the defendant's request for a continuance was presented anew and overruled with a similar instruction to the sheriff. (Vol. I:R. 128)

At the close of the State's case-in-chief the following colloquy ensued:

> BY MR. HARRIS: My next motion, If Your Honor Please, is to renew the motion previously made during the trial for a continuance. We do not have the witnesses, Darryl Robinson and Leon Mills. Both these witnesses were there at the time this happened. It is not the defendant's contention they were eye witnesses, but they were in a vehicle parked several blocks from the Club. They had personal knowledge of Pittman's having a gun and saw the gun in his hand when he returned. They would also have knowledge of statements made by Pittman. This testimony of these two individuals is critical to the Defendant's success in this matter and I cannot defend this man unless these two witnesses are here to testify.
>
> BY THE COURT: The Sheriff will continue his efforts to find the witness. Motion for a continuance is overruled.
>
> (Vol. II:R. 220-21)

On the morning of the third day of trial, October 19, 1977, the motion for a continuance was thrust before the court below for yet a fifth time. Once again it was denied. (Vol. II:R. 222) No further mention of this matter appears in the trial record prior to the filing of appellant's Motion For New Trial on November 4, 1977, two weeks post-verdict. We find in the latter motion the following: ". . .[F]or grounds of said motion [defendant] respectfully shows the following, viz: * * * 4. Failure of trial counsel to call available witnesses who would have contradicted the State's case and shown accused to be innocent of the charge against him." (Vol. III:R. 311)

Prior to the hearing on this motion conducted on November 30, 1977, the defendant's newly retained attorney/23 stated into the record the following:

> BY MR. JOHNSTON: I would like to advise Your Honor that on two occasions I have subpoenaed five witnesses and only one is here. The others, the returns from the Sheriff show not found. The addresses were in Gulfport, except for one that was in Picayune. I don't know whether we should ask the court for an Instanter. I mention that because we wouldn't want to waive our right to that.
>
> BY THE COURT: I will leave that to you, as attorney for the Defendant. If you want further process, just request it.
>
> BY MR. JOHNSTON: We would ask that the four witnesses that we have requested be subpoenaed. They are Leon Mills, Cora Thompson, Jackie Skinner and Daron Robinson.
>
> (Vol. III:R. 322-23)

Of the four witnesses mentioned in the above colloquy, only Leon Mills did not appear to testify at this hearing in the defendant's behalf. One of those witnesses, the defendant's sister Alma Culberson, testified that "Leon Mills is in North Gulfport. I see him just about everyday." (Vol. III:R. 341)

At 1:00 P.M. on this day, the following transpired:

> BY THE COURT: Anything further?

/23 Trial counsel's representation was apparently terminated post-verdict. New counsel was retained to represent petitioner during the hearing on the request for a new trial and in subsequent litigation.

BY MR. JOHNSTON: We haven't heard from the witnesses, If Your Honor Please.

BY THE COURT: Does the State have anything?

BY MR. SMITH: No, Your Honor.

BY THE COURT: Well, gentlemen, we can't just keep putting this off, hoping you will find somebody.

BY MR. JOHNSTON: May It Please The Court, to bring the Court up to date on what we did since the noon recess; we had one of the relatives of the Defendant go out with the Deputy Sheriff to find him, show him where they were, or supposed to be, and they haven't come back yet. The Sheriff said if they couldn't get the Sheriff at Picayune to bring him down, that they would go get him themselves.

BY THE COURT: Let me know when you are ready.

(THE COURT WAS THEREUPON RECESSED FROM THIS CASE AND ANOTHER MATTER WAS TAKEN UP)

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(WITNESSES WERE STILL NOT PRESENT, AND THE COURT WAS THEREUPON RECESSED UNTIL TOMMORROW)

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(Vol. III:R. 348-49)

The following day Cora Thompson (Vol. III:R. 350), Jackie Skinner (Vol. III:R. 353), and Daron [Darryl] Robinson (Vol. III: R. 355), all testified in the defendant's behalf. Their testimony on direct examination, taken together, consists of a total of only 5 1/2 pages and is summarized in the opinion penned by our state appellate court. Obviously the testimony of these witnesses was not overly material to Culberson's defense.

Respondent concurs with the finding of our Court that the testimony of these witnesses hardly adds a new dimension to petitioner's case. It cannot, therefore, be said that the denial of a continuance was an abuse of judicial discretion and that as a result thereof petitioner was denied a right to reasonably effective assistance of counsel, compulsory process, and trial by jury.

> "That the action of the [state] trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this Court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question."

Hardy v. United States, 186 U.S. 224 (1902).

Moreover, scrutiny of the state court briefs and the opinion of the Court following in the wake of appeal, discloses that the federal question, if any indeed, thrust before this Court in a trifurcated context, was neither presented below in this precise posture nor passed upon by the state's highest court. Consequently, the rights and privileges now claimed under the Constitution of the United States were not preserved.

> "[T]his Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court can affirmatively show the contrary. (Emphasis supplied.)"

Street v. New York, 394 U.S. 576, 582 (1969).

CONCLUSION

The petitioner's contentions pose no question of particular moment or indecision in the case law of the land, and it is therefore respectfully submitted that the petition for writ of certiorari in all justice should be denied.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS CAUSE NO. 9005

STANLEY KELVIN COLEMAN

JURY INSTRUCTION

You have found the defendant guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the defendant himself.

To return the death penalty, you must find that aggravating circumstances -- those which tend to warrant the death penalty -- outweigh the mitigating circumstances -- those which tend to warrant the less severe penalty.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed:

1. The capital murder was committed while the defendant was engaged in commission of burglary and/or attempted burglary.
2. The defendant committed the capital murder in an especially heinous, atrocious or cruel manner.

You must unanimously find beyond a reasonable doubt that one or more of the preceding aggravating circumstances

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By ...

exist in this case to return the death penalty. If none of those elements are found to exist, the death penalty may not be imposed and you shall write the following verdict on a sheet of paper:

"We the jury find that the defendant should be sentenced to life imprisonment."

If an element of aggravation is found to exist, then you must consider whether there are mitigating circumstan which outweigh the aggravating circumstances. Consider only the following element of mitigation in determining whether the death penalty should not be imposed:

1. The defendant's age at the time of the capital murder.

If you find from the evidence that the preceding element of mitigation exists, then you must consider whether it outweighs the aggravating circumstances you previously found, and you must return one of the following verdicts. The verdict you return must be written on a separate sheet of pape

(1) "We the jury unanimously find that the aggravating circumstance(s) of: (state the circumstance)_____

_____

[is/are] sufficient to impose the death penalty and that there are insufficient mitig ing circumstances to outweigh the aggravating circumstance(s).

_____

Foreman of the Jury."

or (2) "We, the jury find that the defendant should b
sentenced to life imprisonment."

or (3) "The jury has been unable to agree unanimously
on punishment."

FILED

MAY 10 1978

Marian Brown

CIRCUIT CLERK

A True Copy
This the 14th day of May 80
ROBERT E. WILLIAMS, CLERK
SUPREME COURT, MISSISSIPPI
By Linda Puckett

We the jury unanimously find that the aggravating circumstance of:

1) The capital murder was committed while the defendant was engaged in commission of burglary and/or attempted burglary

is sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstance.

James E. Golden

Foreman of the Jury

FILED

MAY 10 1978

Marian Brown
CIRCUIT CLERK

STATE OF MISSISSIPPI
HINDS COUNTY

I, Robert E. Womack, Clerk of the Supreme Court of the State of Mississippi do hereby certify that the above and foregoing is a true and correct copy of Jury Instruction in Cause #9005 of Forrest County, Ms. as same appears at page 995-997 and of Jury Verdict in Cause #9005 of Forrest County, Ms. as same appears at page 998 of the Original Supreme Court Record as filed with my office on 1-18-79 in the case of STANLEY KELVIN COLEMAN VS. STATE OF MISSISSIPPI

CASE NO. 51,372

as the same appears of record on file in my office, of which I am the keeper of the records in said proceedings; and I certify that as such Clerk I am the custodian and keeper of the records of the files of said Supreme Court and the Seal hereunto affixed is the Seal of said Court.

In witness whereof I have hereunto set my hand and the Seal of said Court in the City of Jackson, County of Hinds and State of Mississippi.

This the 14th day of July, A.D., 1980.

Robert E. Womack
SUPREME COURT CLERK
STATE OF MISSISSIPPI

STATE OF MISSISSIPPI
HINDS COUNTY

I, Neville Patterson, Chief Justice of the Supreme Court of the State of Mississippi, do hereby certify that Robert E. Womack, whose name is signed to the foregoing certificate, is known to me and is the Clerk of the said Supreme Court of the State of Mississippi, duly elected and sworn, and is the keeper of the records, files and proceedings of said Court and is by law the proper person to make out and certify copies of all the records and proceedings of said Court, and that full faith and credit is and ought to be given to his official acts. I further certify that the Seal affixed to his exemplification and transcript is the Seal of the said Supreme Court and that the attestation of said Clerk to said copies is in due form.

This the 14th day of July A.D., 1980.

Neville Patterson
CHIEF JUSTICE OF THE SUPREME COURT
OF MISSISSIPPI

STATE OF MISSISSIPPI
HINDS COUNTY

I, Robert E. Womack, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that Neville Patterson, whose name is subscribed to the foregoing certificate of attestation now is, and was, at the time of signing the same, Judge of said Supreme Court, and was duly elected, commissioned, and qualified to office; that full faith and credit are, and of right ought to be, given to all his official acts as such, in all Courts of record and elsewhere, and that his attestation is in due form of law, and by the proper officer.

Given under my hand, with the Seal of said Court affixed, at office, in the City of Jackson, Mississippi, this the 14th day of July A.D., 1980.

Robt E. Womack

SUPREME COURT CLERK
STATE OF MISSISSIPPI

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OCT 10 PAGE 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

SPECIAL COPY

NO. 79-6715

ALVIN CULBERSON, Petitioner

v.

STATE OF MISSISSIPPI, RESPONDENT

PETITIONER'S REPLY BRIEF

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September 26, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-6715

ALVIN CULBERSON, Petitioner

v.

STATE OF MISSISSIPPI, RESPONDENT

PETITIONER'S REPLY BRIEF

For his reply to the opposition brief of Respondent, Petitioner respectfully states as follows:

I.

STATE ADMITS ERROR IN INSTRUCTION ON MITIGATING FACTORS

In its opposition brief the state indicates that in arriving at its recommendation of sentence to be imposed the correct approach is that followed in Florida where the jury is permitted to consider as a mitigating factor the sentence imposed upon an accomplice. Although the state claims this was done in the present case (Opposition Brief, pp. 16-17), this claim is not supported by the record.

In the only instruction given at the sentence phase the jury was advised what mitigating factors it could consider. These included the age and circumstances surrounding the life and character of the defendant, as well as the circumstances surrounding the commission of the offense. They did not include the sentence received by the accomplice (R.287-289).

The fact that there was evidence adduced during the trial concerning this disparity in sentence is of no help to petitioner.

The jury simply was not instructed by the trial judge that it could consider this disparity as a mitigating factor. Now that the state has admitted that the jury should have been so instructed, we believe this is grounds for reversal.

II.

ABUSE OF DISCRETION IN DENYING CONTINUANCE TO OBTAIN CRITICALLY NECESSARY DEFENSE WITNESSES

The state claims there was no abuse of discretion when the trial judge denied petitioner's request for a continuance to obtain critically necessary witnesses, since the testimony of these witnesses hardly adds a new dimension to the case.

In Hardy v. United States, 186 U.S. 224 (1902), cited on page 49 of the state's brief, the Court examined the proposed testimony for which the continuance was sought, in light of the other evidence in the case, in order to determine whether the trial court abused its discretion in refusing a continuance. The Court concluded that nothing of significance would have been added by the additional evidence. In fact, the Court noted, there was danger of losing some of the prosecution witnesses who might not be available at a later date if a continuance had been granted.

Here the circumstances are quite different. The court was advised that the absent witnesses were critically necessary to the defense, and the court was told how and why they were familiar with the facts of the proposed testimony. The only objections by the state were that the motion came too late, and that it was improper to clutter up the record with what the witnesses would say (R.71). Defense counsel informed the court what would be proved by the absent witnesses, and thus the rule in this regard was substantially complied with. The court was thus able to determine whether the testimony of such witnesses was really significant. The state made no objection to

absence of an affidavit, and under the circumstances this requirement was either met or was waived by the state.

The court below concluded that the testimony of the witnesses who did appear on the motion for new trial "hardly adds a new dimension to appellant's case, although it must be acknowledged that Cora Thompson's testimony about Pittman's demonstration could have possibly affected his credibility." The "demonstration" referred to was Pittman's boastfully pointing to himself as the one who shot and killed Evans. This testimony should have been heard by the jury, since it was diametrically opposed to what Pittman testified, and concerned the central issue of this capital murder case. (Compare also the affidavit of Pittman at R.200).

The jury should also have heard the testimony of Skinner and Robinson which according to the court below raised "an ambiguity concerning ownership of the gun."

The effect of the denial of the request for a continuance was to put the defendant to trial without a single defense witness, i.e. without any defense at all. This was prejudicial to the extreme, and was most assuredly an abuse of discretion by the trial court. Under the test of Hardy v. United States, supra, we submit this was a classic case of abuse of discretion, and warrants reversal of this cause.

III.

DENIAL OF DUE PROCESS

In its response to Petitioner's argument under Point I, regarding unreliability of accomplice testimony, the state has conveniently changed the question and the facts to fit its argument and suggested conclusion. The state has omitted the qualification of unreliability with regard to the testimony of the accomplice

witness in this case. Petitioner insists on the question and argument as they appear in his original Petition as proper under the record of the case.

The Mississippi Supreme Court, in its vigorous effort to uphold the Mississippi death penalty statute, has glossed over some rather significant due process requirements necessary for the protection of one who is charged under these statutes. What has happened, for example, to the requirement that the jury be permitted to hear all of the evidence, not merely the evidence for the state? What has happened to the long-standing rule that the jury is the sole judge of the credibility of witnesses?

Bearing in mind that the jury judges the credibility of witnesses, it is incumbent upon the trial court to see to it that the jury has all the evidence available and needed to render a proper verdict on this issue. The jury should have heard Cora Thompson's testimony about Pittman's boast that he killed Evans. The jury should have also heard the witnesses who were near the scene and who saw and heard Pittman soon after the crime was committed (ownership of the gun issue).

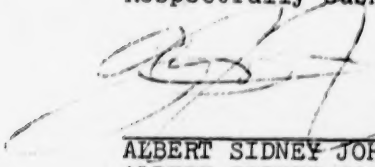
The court below felt that a satisfactory explanation regarding the contradictory affidavit was offered because Pittman thought his life was in danger (opinion p. 503). Was not Pittman's life also indanger when he made the deal to testify for the state? If he would lie under the one circumstance, who can say he would not lie under the other? While Pittman's testimony may not have been unbelievable on its face, it was certainly at best unreliable (and this is all petitioner has argued).

CONCLUSION

For all of the foregoing reason, together with those contained in his original Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

DATED: September 26, 1980.

Respectfully submitted,



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